Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1996

RAYMOND VINCENT NIDDS,

*Petitioner.*

*vs.*

SCHINDLER ELEVATOR CORPORATION,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. On summary judgment, in an action alleging unlawful age discrimination in employment, what is the plaintiff's burden of proof at the pretext stage after the case of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)?

2. Is summary judgment proper when reasonable minds of the Appellate Court differ as to the inferences to be drawn from the evidence and the Court refuses to draw those inferences in the opposing party's favor?

3. Was Nidds deprived his constitutional right to a trial?

## LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. The parent company of Schindler Elevator Corporation is Schindler Elevator Corporation. Schindler Elevator Corporation has no affiliates and no subsidiaries.

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Appendix B — Opinion of the United States Court of Appeals for the Ninth Circuit Filed December 24, 1996 ..... 23a

Appendix C — Opinion of the United States District Court for the Northern District of California Filed November 17, 1994 ..... 44a

Petitioner, Raymond Vincent Nidds, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Amended Opinion of the Court of Appeals for the Ninth Circuit is reported at *Nidds v. Schindler Elevator Corporation*, 113 F.3d 912 (9th Cir. 1997) and is reproduced in the Appendix filed herewith ("App. A"). The Original Opinion of the Court of Appeals for the Ninth Circuit is reported at *Nidds v. Schindler Elevator Corporation*, 103 F.3d 854 (9th Cir. 1996) and is reproduced in the Appendix filed herewith ("App. B"). The Opinion of the Northern District Court is reported at 1994 U.S. Dist. LEXIS 16592 and is reproduced in the Appendix filed herewith ("App. C").

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1997 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

California Government Code § 12941 ("FEHA") states, in relevant part:

> It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.

California courts interpreting FEHA often look to federal cases interpreting the Age Discrimination in Employment Act ("ADEA"),

29 U.S.C. § 621, *et seq.* and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*

## STATEMENT OF THE CASE

Nidds worked as an elevator service mechanic for Schindler's predecessor corporation, Westinghouse, for over sixteen years. Although Nidds had a break in service, he was rehired by Schindler/ Westinghouse in 1988 and assigned to a downtown San Francisco walking route. His hiring supervisor, Graham, praised Nidds as one of Schindler's best employees.

Graham laid Nidds off in October 1990 due to a purported reduction in force, *i.e.*, lack of work. Prior to his layoff, Nidds was rated by Schindler as an "excellent" employee and never had any customer or internal complaints against him. Nidds was told by Graham that the reason for his layoff was the lack of work and his lack of seniority, "last hired/last fired." At or around the time of Nidds' layoff, Graham told two Schindler employees that he [Graham] intended to get rid of all the "Old Timers" and replace them with people with "new blood."

Soon after the layoff, Nidds learned that his service route was not distributed among the existing mechanics, but assigned in its entirety to a much younger Schindler employee who had just become a mechanic thirty days earlier.

In response, Nidds filed his DFEH complaint in December of 1990. Initially, in response to the DFEH complaint, Schindler asserted that Nidds' layoff was due to a lack of work and, specifically, his lack of seniority. During the pendency of the investigation when the DFEH pressed Schindler for details regarding seniority and subsequently discovered that Nidds was not the least senior hire, Schindler changed its justification from Nidds' lack of seniority to Nidds' poor performance on Solid State equipment. In the litigation phase, Schindler completely abandoned

its seniority justification and stated that seniority played no role in the decision to lay Nidds off.

Although Schindler's articulated reason for the October 1990 layoff was a purported reduction in force, it nonetheless contradicted its articulated position by offering Nidds a temporary service position in Fresno only two months after his layoff (upon notice of Nidds' DFEH claim), and then offered him a second, permanent position in Oakland only a few weeks after the Fresno offer. If, in fact, Schindler had a reduction in force in its service departments, why did the company rehire Nidds only three months later? And if Nidds was so incompetent on the Solid State elevators, why did Schindler rehire him for the Oakland route that contained nearly three times as much Solid State equipment as his old San Francisco route?

While Nidds continued to perform his duties on the Oakland route, Nidds sued Schindler. In retaliation, Schindler embarked on a campaign of harassment designed to force Nidds to quit. Schindler transferred Nidds from the Oakland route to Restoration[1] (an assignment known by employees as a "punishment"), and next to Geneva Towers, a high-crime, gang-infested housing project, notorious for its gang violence and drive-by shootings. Nidds performed his duties at Geneva Towers, until he was terminated for his alleged failure to service the elevators at Geneva Towers on a day he was actually on vacation.

## REASONS FOR GRANTING THE WRIT

## SUMMARY OF ARGUMENT

Since the 1993 Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), lower courts have struggled with interpreting the plaintiff's burden of proof with respect to

1. Schindler asserts that Nidds was transferred due to customer complaints. But, as Nidds pointed out, after over eighteen years of service, why didn't Nidds ever receive any internal or customer complaints until after he sued Schindler?

pretext at the summary judgment stage. Conflicts between circuits, as well as within circuits have arisen, leading to inconsistent application of plaintiff's burden of proof to survive summary judgment. The conflict is so well-established, that the circuits have been divided into "pretext-only" versus "pretext-plus" jurisdictions. Without a more specific guidance, the lower courts will continue to issue conflicting interpretations of *Hicks* which, in turn, will lead to inconsistent results as to the employment discrimination plaintiff's burden on summary judgment.

The Supreme Court should resolve this conflict in favor of the pretext-only interpretation of *Hicks*, which allows a plaintiff to avoid summary judgment by raising a genuine issue of material fact with respect to the pretextual nature of defendant's articulated reason for the adverse employment action. Once this Court defines the post-*Hicks* legal standard required to avoid summary judgment in the favor of a pretext-only analysis and applies this analysis to *Nidds*, the Ninth Circuit must be reversed.

In the case at bar, the evidence presented by Appellant Raymond V. Nidds ("Nidds") has been consistently subjected to flawed legal analysis by the lower courts. Although the District Court recognized that the *Nidds* case was governed by *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993), which set forth the three-prong prima facie test for discrimination in a reduction-in-force context, the District Court, nonetheless, held Nidds to a higher and erroneous standard. On appeal, the Ninth Circuit held that the District Court clearly erred in determining that Nidds did not establish his prima facie case for age discrimination.

On appeal, the Ninth Circuit acknowledged the Nidds had established a prima facie case and, therefore, focused on the pretext analysis. Initially, the Ninth Circuit misinterpreted *Hicks* as requiring a pretext-plus standard on summary judgment (despite controlling pretext-only Ninth Circuit authority). The *Nidds* court erroneously applied the pretext-plus legal standard, forcing Nidds to produce evidence both that (1) defendant's articulated reason

was pretextual and (2) that the real reason was age discrimination (App. B). Nidds filed a Petition for Rehearing and the Ninth Circuit amended its opinion, changing its legal interpretation of *Hicks* from the pretext-plus to the pretext-only legal standard.

Although the Ninth Circuit acknowledged that it had held Nidds to an improper and more stringent legal standard, it refused to properly reevaluate the evidence under a pretext-only standard and summarily found that Nidds failed to produce **enough** evidence to allow a "reasonable factfinder to conclude — based on Nidds' prima facie case and the factfinder's disbelief of Schindler's reasons for discharge — that discrimination was the real reason for Nidds' discharge." Again, in a pretext-only jurisdiction, this is not Nidds' burden. Nidds is only required to establish a prima facie case and raise genuine issues of material fact that the employer's articulated reason is pretextual. From that evidence alone, the jury *may* infer discrimination and summary judgment is improper. *See Washington, supra.*

Separate and apart from the Ninth Circuit's improper interpretation and application of *Hicks* to Nidds' evidence, the Ninth Circuit ignored the well-established rule that, on summary judgment, all inferences must be drawn in Nidds' favor. The *Nidds* court engaged in improper factual analysis at the summary judgment stage. As the District Court had done, the Ninth Circuit resolved all factual disputes in Schindler's favor, not Nidds', which is improper on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Moreover, as the *Nidds* opinion and the *Nidds* dissent clearly illustrate, reasonable minds differed on the inferences to be drawn from the evidence. Accordingly, summary judgment was inappropriate. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

## I.

## THIS COURT SHOULD RESOLVE THE "PRETEXT-ONLY" VERSUS "PRETEXT-PLUS" CONFLICT BETWEEN THE CIRCUITS WITH RESPECT TO A PLAINTIFF'S POST-*HICKS* BURDEN OF PROOF ON SUMMARY JUDGMENT.

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on an important question concerning an employment discrimination plaintiff's burden of proof on summary judgment. Since the 1993 Supreme Court's decision *St. Mary's Honor Center v. Hicks*, *supra*, every federal circuit has been faced with the problem of interpreting *Hicks* in light of an employee-plaintiff's burden of proof on summary judgment.

Since the *Hicks* decision, federal courts have been struggling with an issue that *Hicks* did not directly address: what burden must the plaintiff bear to survive the defendant's motion for summary judgment? Two alternate standards have evolved, the "pretext-only" standard and the "pretext-plus" standard, both of which claim genesis in the language of *Hicks*.

Many circuit courts have held that, where the plaintiff has produced sufficient evidence of a prima facie case, and sufficient evidence to create a fact issue as to whether the defendant-employer's stated reasons actually motivated its action, the plaintiff, though not automatically entitled to judgment in his or her favor, is entitled to have the case submitted to the trier of fact. These circuits include the Second, Third, Seventh, Ninth, Tenth, Eleventh and District of Columbia circuit courts of appeals (the "pretext-only" jurisdictions.)

The remaining circuit courts have held that, where the plaintiff has produced such evidence at summary judgment, he is entitled to trial only if the evidence *also* creates a reasonable inference of discrimination — *i.e.*, that the plaintiff's age, race, sex, etc. was a

determining factor in the employer's decision. In order to defeat a defendant's motion for summary judgment, the plaintiff has to establish the "plus", *i.e.*, evidence not just of pretext but of discriminatory motive as well. *See Bodenheimer v. PPG Industries*, 5 F.3d 955 (5th Cir. 1993). These circuits are the First, Fourth, Fifth, Sixth and Eighth circuits courts of appeal (the "pretext-plus" jurisdictions).[2]

A review of the case law in the pretext-only jurisdictions versus the pretext-plus jurisdictions best illustrates the conflict of authority.

The **Second Circuit** is a pretext-only jurisdiction. In *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2nd Cir. 1995), after discussing *Hicks*, the court held that the district court should not have granted JNOV to the employer, since the jury was entitled to (and did) conclude that the employer's explanations were pretextual, and thus to also infer that the employer had discriminated against the plaintiff:

> A trier may thus generally infer discrimination when it finds that the employer's explanation is unworthy of credence. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993) ("[A] plaintiff may meet [the] ultimate burden of proof by combining her proof of the elements constituting a *prima facie* case with evidence that defendant's proffered reasons for its acts were false."), *cert. denied*, __ U.S. __, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994); *DeMarco v. Holy Cross High Sch.*, 4

2. Intra-circuit conflicts have appeared in several circuits. Thus, Nidds does not suggest that every federal circuit may be unqualifiedly labeled a pretext-only or a pretext-plus jurisdiction. Nevertheless, as set forth here, the more recent decisions in most circuits have consistently adopted positions in one of these two categories. Moreover, although the Ninth Circuit is a pretext-only jurisdiction, the *Nidds* court, in its original opinion, applied a pretext-plus analysis of *Hicks*, and continues to apply this standard to Nidds, despite paying lip service to a pretext-only analysis.

> F.3d 166, 170 (2d Cir. 1993) ("Proof that the employer has provided a false reason for its action permits the finder of fact to determine that the defendant's actions were motivated by an improper discriminatory intent, but does not compel such a finding.").

*Binder, supra*, 57 F.3d at 200.[3]

The **Third Circuit**, in a recent *en banc* decision, *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3rd Cir. 1996), made it clear that it is also a pretext-only jurisdiction:

> [We have previously stated that] if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case. . . . [Such a requirement would be] inconsistent with the statement in *Hicks* that upon rejection of the defendants' proffered reasons for the action, no additional proof of discrimination is *required*. 509 U.S. at 511 (internal quotation marks omitted).

*Id.* at 1071 (emphasis in original).[4]

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3. *See also Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2nd Cir. 1995) which places a lesser burden on the plaintiff. In *Cronin*, the court stated that the plaintiff's ultimate burden may be carried by reliance on the evidence comprising the prima facie case, without more (summary judgment reversed); and *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 96 (2nd Cir. 1994) (summary judgment reversed, since "a finding of discriminatory intent may be grounded solely in disbelief of an employer's proffered reason for discharge, especially if accompanied by a suspicion of mendacity.").

4. *See also* the following cases, where the reasoning espoused by *Sheridan* (Cont'd)

Several recent decisions in the **Seventh Circuit** establish the Seventh Circuit as a pretext-only jurisdiction. For example, in *Wohl v. Spectrum Mfg., Inc.*, 94 F.3d 353 (7th Cir. 1996), the court reversed summary judgment after concluding that the plaintiff met his burden under the following test:

> A plaintiff in an age discrimination case may defeat a summary judgment motion brought by the employer if the plaintiff produces evidence that the employer proffered a phony reason for firing the employee. The Supreme Court's opinion in [*Hicks*] specifically permits, but does not require, the fact-finder "to infer the ultimate act of intentional discrimination" based upon such evidence. Therefore, to avoid summary judgment, [the plaintiff] must raise a genuine issue of material fact regarding the sincerity of the proffered reasons for his discharge.

*Id.* at 355 (internal citations omitted).[5] *See also Anderson v. Baxter Healthcare*, 13 F.3d 1120 (7th Cir. 1994), stating that it is clear that the Court in *Hicks* rejected the pretext-only rule applied by the Eighth Circuit and, while less clear, it appears that the *Hicks* Court adopted Seventh Circuit's version of the pretext-only rule rather than the pretext-plus approach of the First Circuit:

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(Cont'd)
was applied to support reversals of summary judgment: *Hampton v. Borough of Tinto Falls Police Dept.*, 98 F.3d 107, 113 (3rd Cir. 1996); *Lawrence v. National Westminster Bank*, 98 F.3d 61, 66 (3rd Cir. 1996); and *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 331 (3rd Cir. 1995).

5. The *Wohl* approach is reflected in the following recent decisions, although none of the plaintiffs in these cases survived summary judgment: *Testerman v. EDS Technical Products Corp.*, 98 F.3d 297, 303 (7th Cir. 1996); *Helland v. South Bend Comm. School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996); *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397, 1404 (7th Cir. 1996); and *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 681-682 (7th Cir. 1996).

> In our view the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and shows that the employer's proffered reasons for her discharge are false. The next logical question is whether the plaintiff may prevail, not automatically as a matter of law, but through submission of her case to the ultimate factfinder, under such circumstances. *Hicks* answers this question in the affirmative.

*Anderson, supra,* 13 F.3d at 1123. Although the *Anderson* court went on to explain that the language in the *Hicks* decision could support a pretext plus reading requiring additional evidence in order to sustain the plaintiff's burden of proof, the *Anderson* court concluded that "such language is dicta." *Id.* at 1124, n.3.

The **Ninth Circuit** is a pretext-only jurisdiction. *See Washington v. Garrett, supra,* and *Warren v. City of Carlsbad,* 58 F.3d 439 (9th Cir. 1995). In *Washington,* the Ninth Circuit held that summary judgment is "inappropriate" whenever "a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive." *Id.* at 1433. The court held that the plaintiff's

> burden on summary judgment . . . is thus to establish a prima facie case of discrimination and, if the employer articulates a legitimate, nondiscriminatory reason for its actions, to raise a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed.

*Id.* at 1433.

The *Washington* court reasoned as follows:

> Because, as *St. Mary's* [*v. Hicks*] recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext **without anything more**, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true.

*Id.*

Significantly, in holding that a showing of pretext (coupled with a prima facie case) is enough to survive summary judgment, the *Washington* court did *not* define "pretext" in the manner the Ninth Circuit did in its original opinion in the *Nidds* case. Moreover, the *Nidds* court, in its amended opinion, did not follow *Washington*, its own precedent, and deny summary judgment when Nidds offered evidence that created triable issues of fact with respect to the pretextual nature of defendant's articulated reason for the adverse employment action.

In *Warren v. City of Carlsbad*, *supra*, the Ninth Circuit additionally noted that a discrimination plaintiff's burden at the summary judgment stage is "not great," but he "must produce evidence of facts that *either* directly show a discriminatory motive *or* show that the [employer's] explanation for [its challenged conduct] is not credible." *Id.* at 443 (emphasis added). *Warren* permits a plaintiff to meet his burden by *either* a showing of non-credibility *or* a showing of discriminatory motive.[6]

The **Tenth Circuit**, in *Randle v. City of Aurora*, 69 F.3d 441

6. This disjunctive test (pretext-only) was not applied in the original *Nidds* opinion. The *Nidds* court, in the original opinion, applied instead a pretext-plus analysis.

(10th Cir. 1995), following a lengthy and thorough analysis of the case law on this subject, unequivocally established itself as a pretext-only jurisdiction:

> Consequently, because a jury may find illegal discrimination upon nothing more than a prima facie case and pretext, such a showing at the summary judgment stage is sufficient to get the case to the jury.

*Id.* at 451. A "pretextual" reason is defined as one that is "unworthy of belief." *Id.* at 452, n.17. Thus, pretext may be shown without proving discrimination.[7]

Although the decisions in the **Eleventh Circuit** are in conflict, the Eleventh Circuit should be considered a pretext-only jurisdiction. In *Howard v. BP Oil Co. Inc.*, 32 F.3d 520 (11th Cir. 1994), the court reversed a summary judgment after noting that:

> Under *St. Mary's*, a plaintiff withstands summary adjudication by producing sufficient evidence to allow a reasonable finder of fact to conclude that the defendant's articulated reasons for its decision are not believable. *Such evidence may consist of a defendant's inconsistent statements.*

*Id.* at 526 (emphasis added).[8]

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7. The *Randle* holding has been adopted in two subsequent decisions, *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 328 (10th Cir. 1996); and *Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1533-1534 (10th Cir. 1995), although in neither case was the plaintiff able to produce sufficient evidence of pretext in order to survive summary judgment. *See also Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 563-564 (10th Cir. 1996) (evidence of pretext sufficient to require that jury be permitted to determine whether discrimination should be inferred).

8. But *see Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, (Cont'd)

The District of Columbia Circuit held, in *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. granted,* 116 S. Ct. 805 (1-19-96), that a jury may infer discrimination from nothing more than a prima facie case and evidence of pretext. Since a plaintiff's burden in opposing summary judgment in this circuit would presumably not be any greater, this circuit may be characterized as a pretext-only jurisdiction.

The remaining circuits subscribe to the pretext-plus interpretation of *Hicks*. According to these circuits, in order to prevail at the summary judgment stage, it is not enough that the plaintiff introduce evidence that raises a genuine issue of material fact regarding pretext. These courts have required that the plaintiff demonstrate both that the employer's reasons are false and that the real reasons were discriminatory.[9] In reaching this latter position, these courts rely on the rationale that because plaintiff bears the burden of persuasion at all times, he must demonstrate both pretext and discrimination in order to avoid summary judgment.

For example, the **First Circuit** in *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994), the EEOC argued that the employee could survive summary judgment by establishing a prima facie case of discrimination and showing a genuine issue of material fact as to whether the employer's asserted reason for the adverse employment action is worthy of credence. The First Circuit disagreed, holding that stating a prima facie case and creating doubt as to the employer's reason would not always permit the factfinder to find for the plaintiff on the ultimate issue of discrimination. The plaintiff, therefore, must create a genuine issue of material fact,

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(Cont'd)
442-443 (11th Cir. 1996) (disagreeing with some of the observations and implications of *Howard*).

9. *See Le Blanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993); *Theard v. Glaxo*, 47 F.3d 676 (4th Cir. 1995); *Bodenheimer v. PPG Industries*, 5 F.3d 955, 957 (5th Cir. 1993); *Durham v. Xerox Corp.*, 18 F.3d 836 (10th Cir. 1994).

through direct or indirect evidence, both that the employer's articulated reason is false and that discrimination was the actual reason for the employment action. The plaintiff's burden at summary judgment was clearly stated in *Udo v. Tome*, 54 F.3d 9 (1st Cir. 1995), a layoff case:

> Thus, once the employer articulates a legitimate, non-discriminatory reason for laying off the plaintiff, to avoid summary judgment, the plaintiff must introduce sufficient evidence to support two findings: (1) that the employer's articulated reason for laying off the plaintiff is a pretext, and (2) that the true reason is discriminatory. *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994). . . . While the plaintiff may rely on the same evidence to prove both pretext and discrimination, the evidence must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by discriminatory animus. *Id.*

*Id.* at 14.

In *Woodman v. Haemonetics Corp.*, 51 F.3d 1087 (1st Cir. 1995) the court set forth the identical requirements, allowing the "same evidence" to prove pretext and discrimination. The court added that a factfinder is permitted to infer discrimination if "the elements of a sufficient prima facie case combine with the factfinder's belief that the ostensible basis for dismissing the employee was pretextual, 'particularly if . . . accompanied by a suspicion of mendacity.' " *Id.* at 1092 (ellipsis in original).

The **Fourth Circuit** is a pretext-plus jurisdiction. In *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir. 1995), the court construed *Hicks* to mean that a plaintiff must do more than demonstrate that the employer's proffered explanation is untrue; he must also prove that discrimination was the real reason for the

challenged conduct. *Id.* at 377-378. Nevertheless, a showing of pretext, along with the prima facie case, at trial "may permit the fact-finder to infer the fact of invidious discrimination with no additional proof of discrimination." *Id.* at 378. It necessarily follows that, in certain cases, a plaintiff may survive summary judgment with no proof of discrimination beyond the evidence that supports pretext and a prima facie case.[10]

The **Fifth Circuit** in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*) makes clear that this circuit is also a pretext-plus jurisdiction:

> In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence. Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer, and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains.

*Id.* at 994.[11] The *Rhodes* court stated that the Supreme Court in

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10. *See also Henson v. Liggett Group, Inc.*, 61 F.3d 270, 276 (4th Cir. 1995) — (plaintiff must demonstrate that the employer's reasons were a pretext for discrimination) and *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) — (plaintiff must prove both pretext and that "discrimination was the real reason").

11. Two recent decisions, both reviewing summary judgments, have specifically relied on *Rhodes* to conclude that in some cases discrimination may be inferred from nothing more than the evidence of pretext. *See Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 41 (5th Cir. 1996); and *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 450 (5th Cir. 1996).

*Hicks* clearly rejected the pretext-only approach. Where the employer shows that it had nondiscriminatory reasons for the adverse employment action, the plaintiff will have to come up with additional evidence of discrimination in offer to avoid summary judgment or a judgment as a matter of law. *Rhodes v. Guiberson Oil Tools Division, supra.*

Although recent decisions in the **Sixth Circuit** are not consistent, it appears that the Sixth Circuit is also a pretext-plus jurisdiction, thus requiring at summary judgment sufficient evidence of both pretext and discrimination.[12] The evidence, however, offered to show pretext may be sufficient by itself, in some cases, to prove discrimination. *Wixson v. Dowagiac Nursing Home*, 87 F.3d 164, 170-171 (6th Cir. 1996). The Sixth Circuit, in *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994), stated that in *Hicks*, the Supreme Court rejected the pretext-only position, but also rejected the pretext-plus position. Accordingly, the *Manzer* court crafted another test: the plaintiff can show one of the following: (1) the proffered reason has no basis in fact, (2) the proffered reason did not actually motivate his discharge; and (3) the proffered reason was insufficient to motivate the discharge. *Id.* at 1084.

Recent cases in the **Eighth Circuit**, particularly *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), establish it as a pretext-plus jurisdiction. The *Rothmeier* court reviewed post-*Hicks* decisions in the circuit and concluded that the plaintiff's burden at summary judgment is to produce sufficient evidence as to both pretext and discrimination. However, the latter requirement "sometimes may be satisfied without additional evidence where

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12. *See Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996) (summary judgment reversed since sufficient evidence of pretext presented, and discrimination could be inferred); *Wixson v. Dowagiac Nursing Home*, 87 F.3d 164, 171 (6th Cir. 1996) (summary judgment affirmed since plaintiff failed to show pretext and discrimination); and *Betkerur v. Aultman Hospital Ass'n*, 78 F.3d 1079, 1097 (6th Cir. 1996) (same). But *see Manzer v. Diamond-Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) (evidence of pretext alone suffices).

the overall strength of the prima facie case and the evidence of pretext 'suffice[s] to show intentional discrimination.' " *Id.* at 1336-1337.[13] The Eighth Circuit held that to survive summary judgment in an ADEA action, the court must apply a two-part test. The evidence must (1) create a fact issue as to whether the employer's proffered reasons are pretextual and (2) create a reasonable inference that age was a determinative factor in the adverse decision. *Rothmeier v. Investment Advisers, supra.*

## II.

## THE PRETEXT-ONLY INTERPRETATION OF *HICKS*, ESPOUSED BY THE MAJORITY OF CIRCUITS, IS THE MORE WELL-REASONED AND INTERNALLY CONSISTENT INTERPRETATION OF AN EMPLOYEE'S BURDEN ON SUMMARY JUDGMENT POST-*HICKS*.

As set forth more fully above, the majority of circuits which have addressed the application of *Hicks* to summary judgment have applied a pretext-only standard. This standard focuses on the sufficiency of the evidence with respect to pretext. In these circuits, if the plaintiff succeeds in establishing a prima facie case and raising a genuine issue of material fact regarding pretext, summary judgment is inappropriate. Textual support for the pretext-only circuits' interpretation of *Hicks* is found in the following language:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the

13. These principles are also set forth in the earlier case of *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 625 (7th Cir. 1995) (summary judgment reversed based upon evidence of pretext); and, more recently, *Roxas v. Presentation College*, 90 F.3d 310, 316, n.3 (7th Cir. 1996) (summary judgment affirmed).

> defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required . . ."

(*Hicks, supra,* 509 U.S. at 511, citations and footnotes omitted).

These circuits construe the *Hicks* opinion narrowly, *i.e.*, *Hicks* merely reversed the Eight Circuit's holding that a prima facie case plus a showing of pretext **compels** judgment for the plaintiff as a matter of law. These circuits hold, based upon the above-quoted language of *Hicks*, that proof of the prima facie case and evidence raising genuine issues of material fact with respect to pretext permits the factfinder to infer discrimination, although it does not dictate such a finding as a matter of law.

Case law in these jurisdictions supports a denial of the defendant's summary judgment motion on the basis of the plaintiff just proving pretext alone. *See Washington v. Garrett, supra*; *MaySun v. Asian American Recovery Services*, 5 F.3d 540 (9th Cir. 1993). These courts have found that where the plaintiff establishes a prima facie case and raises a genuine issue of material fact as to whether the employer's explanation of its action is true, summary judgment is inappropriate.[14] This analysis of *Hicks* is most consistent with the holdings and rationale of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The minority pretext-plus standard is inconsistent with Title

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14. *See Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677 (7th Cir. 1996); *Anderson v. Baxter Healthcare*, 13 F.3d 1120 (7th Cir. 1994); *Gaworski v. ITT Commercial Financial Corp.*, 17 F.3d 1104 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (11th Cir. 1993).

VII precedent. The pretext-plus courts reason that once the employer succeeds "in carrying its burden of production, the *McDonnell Douglas* framework — with its presumptions and burdens — is no longer relevant." *Hicks*, *supra*, 509 U.S. at 510. These courts conclude that once the employer articulates a legitimate, nondiscriminatory reason, only the ultimate issue of whether the employer was motivated by discriminatory animus remains. However, this minority interpretation is inconsistent with the subsequent language in *Hicks*: *i.e.*, that the "factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination and a rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination . . ." *Id.* at 511. Accordingly, this Court should resolve the conflict in favor of a pretext-only legal standard on summary judgment, which is consistent with Title VII precedent and represents a well-reasoned interpretation of *Hicks*.

## III.

## UNDER THE PROPER APPLICATION OF THE PRETEXT-ONLY STANDARD, NIDDS PRESENTED SUFFICIENT EVIDENCE TO SURVIVE SUMMARY JUDGMENT.

The Ninth Circuit agreed that the District Court erred in finding that Nidds had not made out a prima facie case. Accordingly, the focus of the Ninth Circuit analysis was on the pretext stage and Nidds' burden, under *Hicks*, on summary judgment. In its original opinion, the Ninth Circuit held Nidds to a pretext-plus standard and held that Nidds failed to establish pretext. This factual determination was based on a flawed legal analysis of *Hicks*, and was contrary to Ninth Circuit precedent:

> To demonstrate pretext, Nidds' burden essentially is to answer "the ultimate question:

> whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his [age]." *St. Mary's*, 509 U.S. at 511 (quoting *Burdine*, 450 U.S. at 253) . . . On summary judgment, of course, Nidds' burden is only to produce enough evidence that would allow a reasonable factfinder to conclude that the true reason for his discharge was a discriminatory one.
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> * * *
>
> To show that an employer's reason is pretextual, plaintiff must show both that it is false, and that discrimination was the real reason. *St. Mary's*, 509 U.S. at 512 n.4.
>
> * * *
>
> However, the Supreme Court has made it clear that the plaintiff must do more than show that the reason given was false; he must also offer some evidence that the real reason was discriminatory. *St. Mary's*, 509 U.S. at 512 n.4.

(App. B, 33a-34a). As this language clearly shows, the *Nidds* court erroneously applied a rigorous pretext-plus interpretation of *Hicks*, despite the fact that *Washington*, *supra*, unequivocally established the Ninth Circuit as a pretext-only jurisdiction. It is obvious from the *Nidds* original opinion, that intra-circuit confusion over the interpretation of *Hicks* exists in the Ninth Circuit.

Nidds filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. The Ninth Circuit denied Nidds' petition of rehearing, but amended the opinion for intra-circuit consistency. The *Nidds* Opinion, as amended, sets forth a pretext-only standard.

> To satisfy that [pretext] burden, and survive summary judgment, Nidds must produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for Nidds' discharge was false, or (b) that the true reason for his discharge was a discriminatory one. (App. A, 13a).
>
> * * *
>
> Thus, to survive summary judgment, Nidds is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude — based on Nidds' prima facie case and the factfinder's disbelief of Schindler's reasons for discharge — that discrimination was the real reason for Nidds' discharge (App. A, 13a, fn. 2).

However, despite the fact that the *Nidds* court amended its opinion regarding the pretext standard, it held that Schindler was entitled to summary judgment, because the evidence Nidds offered was not "sufficiently probative that it would allow a reasonable factfinder to conclude either that the alleged reason for his discharge was false, or that the true reason for his discharge was a discriminatory one." (App. A, 13a).

In its amended opinion, the *Nidds* court erred by resolving the inferences in Schindler's favor, ignoring evidence presented by Nidds and turning "somersaults trying to explain why Nidds' evidence . . . should not be believed." (App. A, 21a, Dissent.) This was clear error.

This Court has established bright-line rules for construing the opposing party's evidence in his/her favor on summary judgment. The court must view the evidence presented on the motion in the light most favorable to the opposing party: "The evidence of the

non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255. At the summary judgment stage, the nonmovant's version of any disputed issue of fact is presumed correct. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Moreover, even where the basic facts are undisputed, if reasonable minds could differ on the inferences to be draw from those facts, summary judgment should be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157.

The majority opinion and dissent in *Nidds* set forth opposite, reasonable inferences of the evidence: one in Nidds' favor, the other in Schindler's favor. Accordingly, summary judgment was inappropriate as it is Nidds' version that must be believed. Moreover, these competing factual inferences demonstrate that reasonable minds differed with respect to the inferences to be drawn from the evidence. As Nidds presented sufficient evidence to convince a reasonable judge to conclude that he presented sufficient evidence to give rise to genuine issues of material fact that either that the alleged reason for his discharge was false, or that the true reason for his discharge was a discriminatory one, a reasonable factfinder could have agreed. Summary judgment, therefore, was inappropriate.

In addition to ignoring the well-established legal standards on summary judgment, the Ninth Circuit made gross factual errors and ignored evidence presented by Nidds.

First, the *Nidds* court failed to consider that Nidds had two witnesses, not one, to Graham's agist statements:

> Nidds had two witnesses (not one, as the court appears to assume) whose evidence was that Graham, the district superintendent, wanted to get rid of the "Old Timers." The court in its opinion suggests that Graham's comment was "ambiguous." There was not much ambiguity

> about it. That the Old Timers would not kowtow to Graham was connected by him to their length of service; and length of service in this industry meant being over forty. In his comment to Julia Stuart, Schindler's Assistant Field Supervisor, Graham said that the wanted to replace the Old Timers with "new blood" — another distinct reference to age. Even if I agreed with the court that the remark was ambiguous, a reasonable juror could resolve whatever ambiguity there is by an inference in Nidds' favor

(App. A, 21a, Dissent).

Despite the dissent's position, the *Nidds* court characterized Graham's "Old Timer" remark as "weak evidence," and did not take into account that fact that Graham made repeated statements that he wanted to get rid of the "Old Timers" to **two** witness; and told one witness that he intended to replace the "Old Timers"[15] with "new blood."[16]

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15. The definition of "Old Timer" is veteran, oldster (an older or elderly person), something that is old fashioned or antique. Obviously, a reference to an "old timer" is a distinct reference to age.

16. The same result has been reached in many other cases in which summary judgments have been reversed. *See Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1112 (9th Cir. 1991), summary judgment reversed in a sex discrimination case pointed out that plaintiff's superiors called her "an old warhorse" and her students "little old ladies." *See also Shager v. Upjohn Co.*, 913 F.2d 398, 400-402 (7th Cir. 1990), wherein Judge Posner for the Seventh Circuit viewed a supervisor's statements, "These older people don't much like or much care for us baby boomers, but there isn't much they can do about it" and "the old guys know how to get around things," as "direct evidence of hostility to older workers." While acknowledging that the comments were ambiguous, Judge Posner stated, "But the task of disambiguating ambiguous utterances is for trial, not for summary judgment. On a motion for summary judgement the ambiguities in a witness' testimony must be resolved against the moving party." *Id.* at 402. (Cont'd)

Second, the *Nidds* court erred in holding, after resolving the inferences in Schindler's favor, that Nidds did not adduce sufficient evidence to establish genuine issues of material fact with respect to Schindler's articulated reason for the employment action. Although admitting that Nidds did adduce some evidence that Schindler's service business was doing quite well, the *Nidds* court held that this was not enough as it failed to call into question the veracity of Schindler's explanation (App. A, 14a). The Ninth Circuit failed to consider the reasonable inferences from the fact that, despite this purported downturn in business resulting in layoffs in service, Schindler offered Nidds two replacement jobs shortly after his layoff due to the purported lack of work. This evidence was ignored by the Ninth Circuit.

Third, the *Nidds* court erroneously held that Schindler's shifting justifications for his layoff were not "incompatible." The reasonable inferences, if resolved in Nidds' favor, is to the contrary:

> Nidds' evidence of discriminatory intent is properly taken into account with Schindler's shifting explanation of why it laid him off. Schindler said, first, that it was seniority and stuck to that in a proceeding before the DFEH;

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(Cont'd)

*See also Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3rd Cir. 1990), an age discrimination case, the Third Circuit reversed summary judgment in favor of the employer, relying in part on a comment by the defendant's president and chief executive officer, "old dogs don't know how to hunt." While it was unclear whether the phrase indicated age bias or simply dissatisfaction with employees associated with previous management, "this is precisely the sort of question which must be left to the jury." *Id.* at 55. *See also Gallaway v. Curtice-Burns Foods, Inc.*, 806 F. Supp. 28 (W.D.N.Y. 1992), the court held that employer's assertion that employee's lack of qualification was the reason for his demotion was pretextual precluding summary judgement. The court reasoned that where the employee introduced evidence that placed employer's intent and state of mind at issue by pointing to the employee's satisfactory evaluations, coupled with the decision maker's comment about bringing "new blood" into the company, summary judgment was inappropriate.

> finally, when pressed, a year after the layoff Schindler said Nidds was a poor performer on the newer Solid State equipment. Yet when Schindler took Nidds back only four months later, it assigned him to a service route in Oakland which had over twice as many units of Solid State equipment as his old route, and Graham said that Nidds was "the most qualified person at that time." A reasonable jury could easily infer that Schindler was cloaking the discrimination already expressed by Graham with these made-up stories of why the company laid off this old and experienced and efficient employee whom Graham had rated as "excellent".

(App. A, 21a, Dissent). Although the *Nidds* court paid lip service to the rule that ". . . in the ordinary case, such fundamentally different justifications for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason" (App. A, 14a), it improperly strained to interpret the evidence against Nidds.

Finally, with respect to Nidds' retaliation claims, the *Nidds* court again ignored the evidence presented by Nidds and the reasonable inferences therefrom:

> The opinion of the court turns somersaults trying to explain why Nidds' evidence on this point should not be believed. The opinion includes a pure speculation as to whether two incidents of gang violence in a gang-infested neighborhood could occur within a month. It's good jury reasoning. It's highly inappropriate for an appellate body or for a district court that

> is supposed to respect the different functions of judge and jury.

(App. A, 22a, Dissent).

That two judges on the *Nidds* panel drew competing inferences from the evidence presented is the best evidence that reasonable minds differed as to the inferences that might be drawn from the evidence. Accordingly, genuine issues of material fact existed as to pretext on Nidds' age discrimination and retaliation claims. At the summary judgment stage, the court is not to weigh the evidence or determine the truth of the matter but should only decide whether there is a genuine issue for trial. *Washington v. Garrett*, *supra*, 10 F.3d at 1428. As the inferences must be resolved in Nidds' favor, Nidds sustained his burden on summary judgment and must be permitted to proceed to trial.

## IV.

## NIDDS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A TRIAL.

As the Nidds' Dissent emphasized:

> We are dealing here not with some procedural rule or even with a statutory direction. We are under compulsion of a constitutional command entitling persons to trial by jury as it existed at common law. U.S. Const. amend. VII. The time at which common law right existed is the time when the Seventh Amendment was adopted. *Markman v. Westview Instruments, Inc.*, 116 S.Ct. 1384, 1389 (1996). The test is historical. *Id.* A wealth of new scholarship indicates how sensitive to jury verdicts even a fairly high-handed but wise judge such as Lord Mansfield was at the time at the time of our Revolution.

> See, e.g., *Onley v. Allen*, (K.B. 1783), in 1 The Mansfield Manuscripts and the Growth of English Law in the eighteenth Century 354-55 (James Oldham, ed. 1992); *Harris v. Worsley*, (K.B. 1773), in 2 id. 1129-1130 (the jury verdict, upheld by Mansfield, was in his words: "To the astonishment of every body").
>
> It can happen that a judge distrustful of a jury's sympathy for the hard luck of a plaintiff, or a judge conscious that the is the master of the facts and can speed up the process by killing a case early, will enter summary judgment where there are facts open to different interpretation by the jury. However benevolent the judge's motive, the judge is denying the litigants their constitutional right to trial by their peers. We should be the last to give countenance or comfort to such a departure form the basis structure of our law. Therefore, I dissent.

(App. A, 22a).

On appeal, the Ninth Circuit held that Nidds had not produced "sufficient" evidence to create triable issues of fact with respect to pretext, yet failed to hold that the Northern District court erred by staying discovery despite pending discovery disputes between the parties. Again, the Ninth Circuit's opinion is factually in error. The Ninth Circuit insists that the District Court gave Nidds over a year to take three depositions that Nidds never took, and that this lack of diligence precluded a finding that the district court abused its discretion (App. A, 19a).

However, the record is clear that Nidds did have outstanding discovery requests pending and the District Court (through Magistrate Judge Brazil, the discovery commissioner) was ordering Schindler to produce documents. Meanwhile, in the midst of this

discovery dispute, Schindler filed its motion for summary judgment. Although the Northern District (though Magistrate Judge Brazil) was presiding over the discovery dispute and ordering Schindler to produce responsive documents **after** the date of the summary judgment hearing, the Northern District (through Judge Walker) denied Nidds' request for a continuance and stayed all discovery on September 1, 1993.[17] Although staying discovery, Judge Walker allowed Nidds to submit a supplemental brief by November 2, 1993. The stay of discovery, prior to the discovery cutoff and in the midst of a heated discovery dispute, was an abuse of discretion, especially given manifest need for the evidence to oppose the summary judgment motion.

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17. Schindler filed its summary judgment motion on July 23, 1993, in the midst of a heated discovery dispute between the parties. On August 2, 1993, Nidds filed an ex parte application for a continuance. The Northern District court denied the continuance and ordered Nidds to respond to the summary judgment motion by August 10, 1993. Meanwhile, the discovery dispute raged on, and the magistrate judge in charge of discovery issued a discovery order on August 10, 1993 (the day Nidds was ordered by Judge Walker to respond to the motion for summary judgment). Judge Brazil ordered Schindler to produce additional documents by August 16, 1993, **six days after** Nidds had to file his opposition to summary judgment, as per Judge Walker's order. The record is clear that Schindler was producing responsive documents, in a piecemeal fashion, from August 16, 1993 to October 20, 1993. In fact, on August 19, 1993, Schindler admitted that it "overlooked a rather substantial pile of documents." On August 27, 1993, Schindler wrote that it would "[t]oday . . . begin" searching for documents responsive to Nidds' discovery requests.

On August 24, 1993, Judge Walker heard oral argument on Schindler's motion for summary judgment and took the matter under submission. On September 1, 1993, Judge Walker issued an order staying all discovery, except the depositions of three Schindler employees who submitted declarations on summary judgment, abrogating the existing discovery cut-off date of November 1, 1993. On the one hand, Judge Walker permitted the parties to submit supplemental briefs, yet, on the other hand, he stayed all discovery save and except the three depositions mentioned above. Without full and complete discovery, Nidds submitted his supplemental brief and evidence on November 2, 1993, the submission date ordered by Judge Walker.

After Nidds submitted his supplemental brief on November 2, 1993, Judge Walker took the case under submission for a year, from November 2, 1993 to November 17, 1994; Nidds did not have a year to conduct further discovery, as erroneously stated by the Ninth Circuit in its opinion. The record is clear that the lower courts denied Nidds the discovery he needed to oppose Schindler's summary judgment motion, and then chastised Nidds for failing to introduce "sufficient" evidence of pretext. This deprivation of Nidds' constitutional rights to a trial cannot be countenanced.

## CONCLUSION

The post-*Hicks* "pretext-only" and "pretext-plus" split of authority among the circuits, as well as within circuits, has led to inconsistent legal analyses and erroneous application of the law to employment discrimination cases at the summary judgment stage. The lower courts clearly need guidance on the issues raised by this Petition. For the foregoing reasons, Nidds respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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**APPENDIX A — ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION AMENDED APRIL 30, 1997**

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND VINCENT NIDDS,
*Plaintiff-Appellant,*

v.

SCHINDLER ELEVATOR CORPORATION,
*Defendant-Appellee.*

No. 95-15090

D.C. No.
CV-92-02177-VRW

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
August 15, 1996—San Francisco, California

Filed December 24, 1996
Amended April 30, 1997

Before: Joseph T. Sneed, John T. Noonan, Jr., and
David R. Thompson, Circuit Judges.

Opinion by Judge Sneed;
Dissent by Judge Noonan

*Appendix A*

## SUMMARY

### Labor and Employment/Employment Discrimination

The court of appeals denied a petition for rehearing and rejected a suggestion for rehearing en banc. The court held that evidence of a downturn in one sector of an employer's business that requires general layoffs can rebut a prima facie case of age discrimination based on the discharge of an employee in another sector.

Appellant Raymond Nidds was an experienced elevator service mechanic when he was hired by appellee Schindler Elevator Corporation in June 1988. In 1989 or 1990, Schindler's supervisor reportedly told another service mechanic that he intended to get rid of the "old timers." Nidds was laid off in October 1990 when he was 56 years old.

Nidds filed an age-discrimination complaint with the California Department of Fair Employment and Housing (DFEH) when he learned that his former service route had been assigned to Greg Cardenas, a less experienced, 25-year-old mechanic. Schindler laid off 11 employees in 1990 due to a downturn in business.

After Schindler rehired Nidds in January 1991, it received complaints about his job performance. In March 1992, Nidds's supervisor asked him if he had dropped his DFEH complaint. Nidds replied that he had not. In April, Nidds's work assignment was changed; however, his compensation remained the same.

Characterizing the reassignment as a demotion, Nidds filed another complaint with the DFEH in June 1992, charging age discrimination and retaliation. Nidds was again reassigned, this time to a service route in an allegedly high-crime area. Schindler again received customer complaints about Nidds's performance. Nidds was discharged in July.

*Appendix A*

In May 1992, Nidds filed an employment discrimination and retaliation action against Schindler in state court. Schindler removed the action to federal court based on diversity. Discovery cutoff was set for November 1993. In July, Schindler moved for summary judgment. Nidds moved for a continuance for discovery purposes.

The district court denied Nidds's motion, but deferred ruling on Schindler's summary judgment motion to allow Nidds to take three additional depositions and prepare supplemental briefing. Nidds did not take the depositions. The district court granted Schindler's motion for summary judgment as to all of Nidds's claims. Nidds appealed.

[1] To show a prima facie case of discrimination, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination. The evidence may be either direct or circumstantial. [2] To establish a prima facie case of age discrimination through circumstantial evidence, Nidds had to show that he was: (1) a member of the protected class; (2) performing his job in a satisfactory manner; (3) discharged; and (4) replaced by a substantially younger employee with equal or inferior qualifications. [3] Failure to prove replacement by a younger employee is not necessarily fatal to an age-discrimination claim when the discharge results from a general reduction in the workforce due to business conditions.

[4] The district court erred in concluding that to establish a prima facie case, Nidds was required to show that he was at least as qualified as his replacement. [5] Nidds established a presumption that Schindler unlawfully discriminated against him.

[6] To rebut the presumption, Schindler merely had to articulate a legitimate, nondiscriminatory reason for the action. [7] Schindler met its burden by offering evidence that a downturn in work required some layoffs, and that it used a combination of factors in deciding whom to discharge. The burden

returned to Nidds to show that Schindler's articulated reason was a pretext for discrimination.

[8] To satisfy that burden, Nidds had to produce enough evidence to allow a reasonable factfinder to conclude *either* that the alleged reason for his discharge was false *or* that the true reason was a discriminatory one. [9] Nidds's evidence was not sufficiently probative.

[10] Nidds' evidence that Schindler's service business was doing well did not raise a genuine issue of material fact. Schindler explained that there was a downturn in *construction* business, not *service* business, and that it responded by moving employees from construction to service, and they laying off service employees. Nidds failed to adduce evidence that called into question the veracity of Schindler's explanation.

[11] Schindler's reasons were not properly described as "shifting." Lack of work was the reason given for the layoffs in general, while Nidds' lack of seniority and poor performance were the reasons given for his layoff. Nidds' evidence was therefore insufficient to raise a genuine issue of fact as to whether Schindler's reasons for the layoff were pretextual.

[12] A prima facie case of retaliation requires the plaintiff to show that he engaged in a protected activity, that his employer subjected him to adverse employment action, and that there was a causal link between the protected activity and the employer's action. Nidds's termination was an adverse employment action. [13] Nidds's complaints to the DFEH were protected activity. [14] Nidds submitted sufficient evidence to create an inference of a "causal link," and the temporal proximity of events was sufficient to satisfy that requirement.

[15] However, Schindler met its burden of articulating a legitimate reason for the layoff. Nidds failed to produce enough evidence from which a reasonable factfinder could

conclude that Schindler's articulated reason was a pretext for retaliatory termination.

[16] A district court does not abuse its discretion by denying further discovery if the movant has failed to diligently pursue discovery in the past. [17] Nidds's lack of diligence in taking depositions after the district court postponed its ruling on Schindler's motion for summary judgment precluded a finding that the district court abused its discretion.

Judge Noonan dissented, writing that the district court should not have granted summary judgment for Schindler because a reasonable juror could have inferred from the facts that Schindler's reason for laying off Nidds was pretextual.

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## COUNSEL

Kendra L. Tanacea, San Francisco, California, for the plaintiff-appellant.

Rebecca Hull, Cynthia H. Plevin, Sedgwick, Detert, Moran & Arnold, San Francisco, California, for the defendant-appellee.

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## ORDER

The opinion filed in this case on December 24, 1996, (slip op. 16047), is hereby amended as attached.

With this amendment, a majority of the panel voted to deny appellant's petition for rehearing. Judge Thompson voted to reject the suggestion for rehearing en banc and Judge Sneed so recommended. Judge Noonan voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

*Appendix A*

The full court has been advised of the suggestion for en banc rehearing, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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## OPINION

SNEED, Circuit Judge:

Raymond Vincent Nidds appeals the grant of summary judgment in favor of his former employer, Schindler Elevator Corp. ("Schindler"), on his California Fair Employment and Housing Act ("FEHA") discrimination and retaliation claims. Federal jurisdiction is based on the parties' diversity of citizenship. Nidds also contests the district court's refusal to continue discovery before ruling on Schindler's summary judgment motion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

### I.

### *BACKGROUND OF THE DISPUTE*

Nidds was a highly experienced, 54-year-old elevator service mechanic when he was hired by Schindler on June 13, 1988, and assigned to a downtown San Francisco service route. He was well-liked by his customers and his employer. Sometime in 1989 or 1990, Schindler's District Service Supervisor, Darrel Graham, allegedly told another service mechanic that he intended to get rid of all the "old timers" because they would not "kiss my ass." On October 5, 1990, Nidds and two other service mechanics were laid off. Graham wrote a favorable letter of recommendation for Nidds, and assured him that he would be considered for reemployment

should business pick up. Shortly thereafter, his route was assigned at least in substantial part to 25-year-old Greg Cardenas, a former "helper" (an apprentice) employed by Schindler since 1985, who had passed his mechanic's test only 30 days earlier.

When Nidds learned that his route had been assumed by Cardenas, he filed an age discrimination complaint with the California Department of Fair Employment and Housing ("DFEH") on December 7, 1990. The investigation by DFEH revealed that Schindler laid off a total of eleven employees during 1990 due to a purported downturn in business. Sixty-four percent of those employees were over 40 years old. Asked how it selected employees for layoff, Schindler initially responded that seniority was the basis, and later, that it looked at a combination of factors, including seniority, job performance, special expertise, and competence. Schindler explained that Nidds was overall a very good employee but that he was less proficient on the modern "Solid State" equipment than other mechanics. As to Nidds' claim that there was no downturn in work in the company's service arm, Schindler explained that the downturn was in the construction arm, and that its practice was to shift its best employees from construction to service to avoid losing them to competitors, and to lay off employees from service to compensate. In November 1991, the DFEH informed Nidds that it would not pursue his claim.

Earlier Schindler had made two offers to rehire Nidds, the first for a route in Fresno, the second for an Oakland route; Nidds rejected the first but accepted the latter in January 1991. Schindler soon began receiving complaints from the manager of 1800 Harrison, a building that accounted for 60% of the revenues on the Oakland route. Schindler also allegedly received complaints from its troubleshooters, who said that Nidds needed their help more than did other mechanics.

In March 1992, Nidds was purportedly asked by a supervisor whether he had dropped his DFEH complaint, to which he

replied that he had not. Later that month, Nidds' attorney informed Schindler of Nidds' intention to sue the company for age discrimination. In April 1992, Schindler removed Nidds from the Oakland route and assigned him to the restoration department. Although his compensation was unaffected, Nidds characterizes this transfer as a demotion. In response, Nidds filed a second complaint, charging age discrimination and retaliation, with the DFEH on June 10, 1992.

Schindler transferred Nidds again in June 1992, from the restoration department to a service route that included the Geneva Towers, an allegedly high-crime housing complex in San Francisco. On June 26, Nidds left Geneva Towers in the middle of the day after learning of riots at nearby Woodrow Wilson High School. Although he returned later in the afternoon to repair two malfunctioning elevators, his behavior annoyed Geneva Towers' management. A subsequent cascade of meetings and correspondence between Geneva Towers and Schindler resulted in a decision to remove Nidds from the route. Nidds, who went on vacation from July 2 to July 22, learned of this decision on his return. Shortly thereafter, on July 28, he was laid off for the second and final time.

Nidds filed his employment discrimination and retaliation complaint in California Superior Court on May 5, 1992. In June, Schindler removed the action to federal court based on the parties' diversity of citizenship. Following extensive discovery by Nidds' attorney and several discovery disputes during 1992 and 1993, the magistrate set a discovery cutoff date of November 1, 1993. On July 23, however, Schindler proceeded to move for summary judgment. Nidds requested a continuance so that he could depose several of Schindler's declarants and obtain additional documents. The district court denied the continuance in August, but deferred ruling on the summary judgment motion to allow Nidds to take three more depositions and to allow time for supplemental briefing. The depositions were never taken, and on November 17, 1994, the

district court granted Schindler's motion for summary judgment on all of Nidds' claims. Nidds timely appealed.

II.

*THE AGE DISCRIMINATION CLAIM*

We review the district court's grant of summary judgment on both the age discrimination and retaliation claims de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1261 (1996). We must decide whether there is a "***genuine*** issue as to any ***material*** fact." Fed. R. Civ. P. 56(c) (emphasis added). The criteria of "genuineness" and "materiality" are distinct requirements. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The requirement that an issue be "genuine" relates to the quantum of evidence the plaintiff must produce to defeat the defendant's motion for summary judgment. There must be sufficient evidence "that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

"As to materiality, the substantive law will identify which facts are material." *Id.* at 248. Nidds' age discrimination claim, which relates to his October 1990 layoff, is based on the California Fair Employment and Housing Act ("FEHA"). FEHA reads in relevant part:

> It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.

Cal. Gov't Code § 12941. California courts interpreting FEHA often look to federal cases interpreting the Age Dis-

crimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. *See Stephens v. Coldwell Banker Commercial Group, Inc.*, 245 Cal. Rptr. 606, 609 (App. 1988). Therefore, we too rely on such cases where helpful.

An age discrimination case alleging disparate treatment, such as this one, involves shifting burdens of proof as follows:

> [A] plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

*Wallis v. J. R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (1986)); *see also Caldwell v. Paramount Unified Sch. Dist.*, 48 Cal. Rptr. 2d 448, 453-54 (App. 1995), *rev. denied* (1996). However, the burden of persuasion remains at all times with the plaintiff. *Washington v. Garrett*, 10 F.3d 1421, 1432 (9th Cir. 1994).

A. *The Prima Facie Case Barrier*

[1] "In order to show a *prima facie* case of discrimination, 'a plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." ' " *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1110 (9th Cir. 1991) (quoting *Lowe v. City of Monrovia*, 775 F.2d at 1005, quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). That evidence may be either direct or circumstantial, and very little is required. *Messick v. Hori-*

*zon Indus. Inc.*, 62 F.3d 1227, 1229 (9th Cir. 1995); *Caldwell*, 48 Cal. Rptr. 2d at 454.

[2] To establish a prima facie case of age discrimination through circumstantial evidence, the plaintiff must show that he was:

(1) a member of a protected class [age 40-70];

(2) performing his job in a satisfactory manner;

(3) discharged; and

(4) replaced by a substantially younger employee with equal or inferior qualifications.

*Wallis*, 26 F.2d at 891 (quoting *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990)).

[3] The fourth element, however, has been treated with some flexibility: "We have held that the failure to prove replacement by a younger employee is 'not necessarily fatal' to an age discrimination claim where the discharge results from a general reduction in the work force due to business conditions." *Rose*, 902 F.2d at 1421; *see also Ewing v. Gill Indus., Inc.*, 4 Cal. Rptr. 2d 640, 645 (App. 1992). Rather, courts "require instead that the plaintiff show through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Rose*, 902 F.2d at 1421. This inference "can be established by showing the employer had a continuing need for his skills and services in that his various duties were still being performed," *Wallis*, 26 F.3d at 891 (internal quotation omitted), or by showing "that others not in her protected class were treated more favorably." *Washington*, 10 F.3d at 1434.[1]

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[1]*See also Caldwell*, 48 Cal. Rptr. 2d at 455 (prima facie established where "(1) complainant belongs to a protected class; (2) his job perfor-

[4] The district court ignored the flexibility these cases require and erred in concluding that to establish a prima facie case, Nidds was required to show that he was at least as qualified as his replacement. The court also erred by counting against Nidds the fact that he was not directly replaced by the younger employee, Cardenas. Under *Rose*, *Wallis*, and *Washington*, it is enough that Nidds' duties were substantially transferred to Cardenas.

[5] In summary, Nidds has shown that he was discharged; that he was performing satisfactorily; and that his duties continued to be performed by a substantially younger individual. Nidds therefore cleared the prima facie case barrier and established "a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (internal quotation omitted).

B. *Schindler's Burden*

[6] However, to rebut this presumption the employer must merely articulate a legitimate, nondiscriminatory reason for the action. *Id.*; *Wallis*, 26 F.3d at 892. Once the employer meets this burden, the presumption of discrimination drops away. *St. Mary's*, 509 U.S. at 507; *Wallis*, 26 F.3d at 892.

[7] Schindler met its burden by offering some evidence that a downturn in work required some layoffs, and that it used a combination of factors, including performance, technical qualifications, and seniority, in deciding whom to discharge.

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mance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class") (internal quotation omitted); *Ewing*, 4 Cal. Rptr. 2d at 645 (in a reduction in force case, a discharged employee "need not show that he was replaced by a younger, newly hired employee; it is sufficient that the discharge occur in circumstances giving rise to an inference of age discrimination") (internal quotation omitted).

As a consequence, the burden returned to Nidds to show that Schindler's articulated reason was a pretext for discrimination.

C. *Pretext*

[8] To satisfy that burden, and survive summary judgment, Nidds must produce enough evidence to allow a reasonable factfinder to conclude *either*: (a) that the alleged reason for Nidds' discharge was false, *or* (b) that the true reason for his discharge was a discriminatory one. *Warren*, 58 F.3d at 443 (stating that the plaintiff "must produce evidence of facts that either show a discriminatory motive or show that the [employer's] explanation for his rejection is not credible").[2]

[9] Applying the law to the facts before us, we hold that Schindler was entitled to summary judgment, because the evidence Nidds has offered is not sufficiently probative that it would allow a reasonable factfinder to conclude either that the alleged reason for his discharge was false, or that the true reason for his discharge was a discriminatory one.

[10] Nidds presents three distinct arguments that, he says, raise sufficient factual disputes that require his case to proceed to trial. First, he argues that Schindler's explanation for the initial layoff, a downturn in business, was false. Nidds

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[2]At trial, Nidds must prove "*both* that the [employer's alleged] reason was false, *and* that discrimination was the real reason." *St. Mary's*, 509 U.S. at 515 (emphasis in original). However, if Nidds persuades the jury that the defendant's alleged reason is false, then "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . together with the elements of the prima facie case . . . will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required*." *Id.* at 511 (emphasis in original). Thus, to survive summary judgment, Nidds is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude — based on Nidds' prima facie case *and* the factfinder's disbelief of Schindler's reasons for discharge — that discrimination was the real reason for Nidds' discharge.

asserts that there was no downturn in business. In support of this claim, Nidds adduces some evidence that Schindler's service business was doing quite well. But this evidence does not raise a genuine issue of material fact. Schindler explained that there was a downturn in *construction* business, not *service* business, and that it responded to the downturn in its construction business by moving employees from construction to service, and then laying off service employees. Nidds has failed to adduce any evidence that calls into question the veracity of Schindler's explanation.

[11] Second, Nidds argues that summary judgment against his claims was improper because of Schindler's shifting explanations for the October 1992 layoff. These alone, he insists, are enough to raise a genuine issue as to its discriminatory motives. He cites *Washington*, 10 F.3d at 1434 ("We note that, in the ordinary case, such fundamentally different justifications for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason"), and *Lindhahl v. Air France*, 930 F.2d 1434, 1438-39 (9th Cir. 1991) (reasons for discharge not credible where they were vague, unsupported by the facts, and not articulated until the litigation commenced). However, the reasons given by Schindler are not incompatible, and therefore not properly described as "shifting reasons." "Lack of work" was the reason given for the layoffs in general, while Nidds' lack of seniority and poorer performance relative to other mechanics were the reasons given for *his* layoff specifically. Therefore, Nidds' evidence is insufficient to raise a genuine issue of fact as to whether Schindler's reasons for the layoff were pretextual.

Moreover, there is insufficient evidence to raise a genuine issue of fact as to whether the actual reason was a discriminatory one. Nidds cites the "old timers" comment allegedly made by Graham as evidence of a discriminatory motive. That comment, however, was very much like the comments in

*Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993), which the court held did not support an inference of discriminatory motive. In *Nesbit*, the plaintiff's immediate supervisor commented to Nesbit that "[w]e don't necessarily like grey hair." The court found that the "comment was uttered in an ambivalent manner and was not tied directly to Nesbit's termination," and upheld the grant of summary judgment in favor of the employer. *Id.*

Similarly, Graham's comment was ambiguous because it could refer as well to longtime employees or to employees who failed to follow directions as to employees over 40. Moreover, the comment was not tied directly to Nidds' layoff. Like the comment in *Nesbit*, therefore, it is weak evidence and not enough to create an inference of age discrimination.

Also distinguishable is *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 295 (1996), upon which Nidds relies. There, we reversed the grant of summary judgment in favor of the employer where the employee had alleged "that on three separate occasions, when he asked to be considered for president, he was told the Board wanted somebody younger for the job" and had submitted evidence to the same effect in the form of meeting notes and an affidavit of a coworker. Nidds' evidence, by contrast, is neither as direct nor as weighty. It is not enough to support an inference of age discrimination.

## III.

## *THE RETALIATION CLAIM*

### A. *Prima Facie Case*

**[12]** In a retaliation case, the burden shifting scheme is much the same as that in an age discrimination case. *Lam v. University of Hawaii*, 40 F.3d 1551, 1559 & n.11 (9th Cir. 1994). A prima facie case requires the plaintiff to show "that

he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." *Flait v. North Am. Watch Corp.*, 4 Cal. Rptr. 2d 522, 528 (App. 1992).

[13] Nidds' complaints to the DFEH were protected activity because California law specifically prohibits employers from taking adverse actions against employees as a result of their filing a complaint alleging FEHA violations. *See* Cal. Gov't Code § 12940(f). Although we decline to view Nidds' transfer to the restoration department as an adverse employment action,[3] his ultimate termination on July 28, 1992, certainly was.

[14] Moreover, Nidds has submitted sufficient evidence to create an inference of a "causal link" between Nidds' complaints and his July 1992 layoff. The layoff occurred only four months after his supervisor allegedly asked him if he had dropped his first discrimination complaint (March 1992) and only one month after he filed his second complaint (June 10, 1992). The temporal proximity of events was sufficient to satisfy the third element of the prima facie case. *See Flait*, 4 Cal. Rptr. 2d at 529-30 (sufficient causal link where supervisor who terminated employee had made sexist comments to another employee and fired employee five months after a confrontation).

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[3]*See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n.6 (9th Cir. 1994) (questioning whether transfer from swing shift to day shift was "adverse" employment action where employee "was not demoted, or put in a worse job, or given any additional responsibilities"), *cert. denied*, 115 S. Ct. 733 (1995); *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987) (no adverse employment action where temporary transfer did not result in loss of salary or benefits).

*Appendix A*

B. *The Employer's Burden*

[15] Schindler, however, also met its burden of articulating a legitimate reason for the layoff. It was that the management of Geneva Towers requested that Nidds be removed from the route, and that Schindler had no other place for him. Thus, the deciding question again is whether Nidds has produced enough evidence from which a reasonable factfinder could conclude that Schindler's reason was a pretext for retaliatory termination. We hold that again Nidds has failed to make that showing.

C. *Pretext*

The crux of Nidds' argument is that Schindler encouraged the management of Geneva Towers to complain about Nidds so that Schindler would have a reason to terminate Nidds in retaliation for his filing his second age discrimination claim and intent to sue letter. For support, he cites the letter and testimony of Arthur Hutton, Geneva Towers' administrator, concerning an incident in which Nidds purportedly failed to respond to a service call.

In Hutton's letter to Ken Robinson of Schindler, dated July 21, 1992, he stated: "Pursuant to our conversation of today, we feel that it is in both our interest to relieve Mr. Ray Niddes [sic] from his duties at Geneva Towers Apartments. The environment seems to dictate whether he is able to perform his duties on a day-to-day basis." Hutton testified at his deposition that "I believe that I wrote that letter immediately — well, I believe that I spoke with Ken Robinson immediately after I became aware that the incident took place. Shortly after that, if my recollection serves me correctly, I proceeded to write the letter." Hutton testified further that "[Robinson] suggested that I write a letter expressing what we talked about over the phone."

Nidds argues that because he was on vacation from July 2 through July 21, this evidence shows that "another Schindler

mechanic failed to respond to the Geneva Towers' service call. Then Robinson, seeking to find a pretext for Nidds' termination, asked Hutton to write a letter regarding *Nidds'* failure to service the route."

Nidds' proposed inference is not one that a reasonable fact-finder could make. Hutton's own testimony indicates that he called Robinson and then wrote to him when he *became aware* of the incident, not when it actually happened. Moreover, the incident that prompted the call was clearly the June 26 incident when Nidds left Geneva Towers after hearing about a gang riot at the nearby high school: Hutton stated at deposition that "I do know that the information that I received indicated that Mr. Nidds didn't want to come out because he had heard that there had been violence, gang violence, during the course of that day." It is unlikely that the same incident recurred a month later with the same response from some other Schindler mechanic. Although the time lag between the June 26 incident and Hutton's phone call of about July 21 remains unexplained, the reasonable inference from Hutton's testimony is that he did not learn of the incident until the latter date.

Other evidence also supports Schindler's explanation that Geneva Towers was dissatisfied with Nidds' performance. Schindler employee Larry Scharfe stated in a declaration that "Mr. Gray [of Geneva Towers] expressed some concerns regarding Mr. Nidds leaving his job. He said that he and others in management at the apartment complex were not satisfied with the service or the attitude of the new service person, Mr. Nidds." Schindler employee Ken Robinson stated that "Mr. Gray said that he or someone else would set out their concerns regarding Mr. Nidds in writing and send them to Schindler." In a June 26, 1992, memo to Graham, Robinson explained that "At our June 25, 1993 meeting, Mr. Gray expressed his concern that Geneva Towers was merely a number on Mr. Nidds' route sheet. Mr. Gray told me that he was concerned that the level of service would decline now that

Nidds had been assigned because Mr. Nidds did not care about Geneva Towers' problems."

In light of this evidence, neither Hutton's letter nor his testimony are sufficient to allow a reasonable factfinder to conclude that Schindler used Geneva Towers' concerns as a pretext to discharge Nidds. We therefore affirm summary judgment on this claim as well.

## IV.

## *THE RULE 56(f) MOTION*

[16] "We review a district court's denial of a [Fed. R. Civ. P. 56(f)] request for further discovery by a party opposing summary judgment for abuse of discretion." *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995), *cert. denied*, 117 S.Ct. 56 (1996). The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, *id.*, and that it would prevent summary judgment. *Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). "Moreover, the district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past." *Conkle*, 73 F.3d at 914 (internal quotation omitted).

[17] A problem might exist had the district court denied Nidds' motion for a continuance where Nidds had outstanding discovery requests and November, the cutoff date for discovery, was still several months away. Here, however, the court postponed ruling on the summary judgment motion for over a year to give Nidds time to take three depositions. Yet, Nidds never took the depositions. This lack of diligence precludes a finding that the district court abused its discretion. *See, e.g., Hauser v. Farrell*, 14 F.3d 1338, 1340-41 (9th Cir. 1994) (denial of Rule 56(f) motion proper in light of failure to depose witness within 27 months of filing suit); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) (failure

to take advantage of additional month of discovery granted by district court showed lack of diligence).

V.

*CONCLUSION*

Because Nidds' evidence of discrimination and retaliation is insufficient, we affirm the grant of summary judgment in favor of Schindler. We also hold that the district court did not abuse its discretion in denying Nidds' motion for a continuance of the summary judgment hearing.

AFFIRMED.

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NOONAN, Circuit Judge, dissenting:

We all agree that the district court erred in finding that Nidds had not made a prima facie case. He had, and the burden shifted to Schindler to produce a nonpretextual nondiscriminatory reason for his discharge. What we disagree about is whether Nidds produced enough evidence from which a reasonable juror could have inferred that Schindler's reason was pretextual and that in fact it laid him off because of his age.

Nidds had two witnesses (not one, as the court appears to assume) whose evidence was that Graham, the district superintendent, wanted to get rid of the "Old Timers." The court in its opinion suggests that Graham's comment was "ambiguous." There was not much ambiguity about it. That the Old Timers would not kowtow to Graham was connected by him to their length of service; and length of service in this industry meant being over forty. In his comment to Julia Stuart, Schindler's Assistant Field Supervisor, Graham said that he wanted to replace the Old Timers with "new blood" —

another distinct reference to age. Even if I agreed with the court that the remark was ambiguous, a reasonable juror could resolve whatever ambiguity there is by an inference in Nidds' favor. We're operating under circuit law which is unequivocal in setting "a high standard for the granting of summary judgment in employment discrimination cases." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 295, 65 U.S.L.W. 3286 (Oct. 15, 1996). The standard should not unaccountedly be lowered.

Nidds' evidence of discriminatory intent is properly taken into account with Schindler's shifting explanation of why it laid him off. Schindler said, first, that it was senority and stuck to that in a proceeding before the DFEH; finally, when pressed, a year after the layoff Schindler said Nidds was a poor performer on the newer Solid State equipment. Yet when Schindler took Nidds back only four months later, it assigned him to a service route in Oakland which had over twice as many units of Solid State equipment as his old route, and Graham said that Nidds was "the most qualified person at that time." A reasonable jury could easily infer that Schindler was cloaking the discrimination already expressed by Graham with these made-up stories of why the company laid off this old and experienced and efficient employee whom Graham had rated as "excellent."

As to retaliation, it is Nidds' evidence that assignment to Geneva Towers was the company's not very nice and not very subtle way of dumping employees it wanted to punish; and it was the convenient prelude to pushing him out altogether. Schindler put him there shortly after Schindler had pointedly inquired about his discrimination filing before the DFEH. Within two months, Nidds was fired from this route as a result of a letter which in so many words indicates that the request of Geneva Towers to remove Nidds was coordinated with Schindler management. The opinion of the court turns somersaults trying to explain why Nidds' evidence on this point should not be believed. The opinion includes a pure specula-

tion as to whether two incidents of gang violence in a gang-infested neighborhood could occur within a month. It's good jury reasoning. It's highly inappropriate for an appellate body or for a district court that is supposed to respect the different functions of judge and jury.

We are dealing here not with some procedural rule or even with a statutory direction. We are under compulsion of a constitutional command entitling persons to trial by jury as it existed at common law. U.S. Const. amend. VII. The time at which the common law right existed is the time when the Seventh Amendment was adopted. *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996). The test is historical. *Id.* A wealth of new scholarship indicates how sensitive to jury verdicts even a fairly high-handed but wise judge such as Lord Mansfield was at the time at the time of our Revolution. *See, e.g., Olney v. Allen*, (K.B. 1783), *in* 1 *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 354-55 (James Oldham, ed. 1992); *Harris v. Worsley*, (K.B. 1773), *in* 2 *id.* 1129-1130 (the jury verdict, upheld by Mansfield, was in his words: "To the astonishment of every body").

It can happen that a judge distrustful of a jury's sympathy for the hard luck of a plaintiff, or a judge conscious that he is the master of the facts and can speed up the process by killing a case early, will enter summary judgment where there are facts open to different interpretation by the jury. However benevolent the judge's motive, the judge is denying the litigants their constitutional right to trial by their peers. We should be the last to give countenance or comfort to such a departure from the basic structure of our law. Therefore, I dissent.

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 24, 1996

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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|---|---|
| RAYMOND VINCENT NIDDS, *Plaintiff-Appellant,* v. SCHINDLER ELEVATOR CORPORATION, *Defendant-Appellee.* | No. 95-15090<br>D.C. No. CV-92-02177-VRW<br>OPINION |

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
August 15, 1996—San Francisco, California

Filed December 24, 1996

Before: Joseph T. Sneed, John T. Noonan, Jr., and David R. Thompson, Circuit Judges.

Opinion by Judge Sneed;
Dissent by Judge Noonan

## SUMMARY

### Labor and Employment/Employment Discrimination

Appellant Raymond Nidds was an experienced elevator service mechanic when he was hired by appellee Schindler Elevator Corporation in June 1988. In 1989 or 1990, Schindler's district service supervisor reportedly told another service mechanic that he intended to get rid of the "old

timers." Nidds was laid off in October 1990 when he was 56 years old. Nidds filed an age discrimination complaint with the California Department of Fair Employment and Housing (DFEH) when learned that his former service route had been assigned to Greg Cardenas, a less experienced, 25-year-old mechanic. Schindler laid off 11 employees in 1990 due to a downturn in business.

Schindler rehired Nidds in January 1991. Schindler received complaints about Nidds's job performance. In March 1992, Nidds's supervisor asked him if he had dropped his DFEH complaint. Nidds replied that he had not. In April 1992, Nidds's work assignment was changed; however, his compensation remained the same. Characterizing the reassignment as a demotion, Nidds filed a second complaint with the DFEH charging age discrimination and retaliation in June 1992. Nidds was reassigned again to an allegedly high-crime service route. Schindler received customer complaints about Nidds's performance. Nidds was laid off in July 1992.

In May 1992, Nidds had filed an employment discrimination and retaliation complaint in state court. Schindler removed the action to federal court based on diversity. Discovery cutoff was set for November 1993. In July 1993, Schindler moved for summary judgment. Nidds moved for a continuance for discovery purposes. The district court denied Nidds's motion but deferred ruling on the summary judgment motion to allow Nidds to take three additional depositions and to allow time for supplemental briefing. Nidds did not take the depositions. The district court granted Schindler's motion for summary judgment on all of Nidds's claims. Nidds appealed.

[1] To show a prima facie case of discrimination, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination. The evidence may be either direct or circumstantial. [2] To establish a prima facie case of age discrimination through circumstantial evidence, Nidds had to show that

he was : (1) a member of the protected class; (2) performing his job in a satisfactory manner; (3) discharged; and (4) replaced by a substantially younger employee with equal or inferior qualifications. [3] The failure to prove the replacement by a younger employee is not necessarily fatal to an age discrimination claim where the discharge results from a general reduction in the work force due to business conditions. [4] The district court erred in concluding that to establish a prima facie case Nidds was required to show that he was at least as qualified as Cardenas. [5] Nidds established a presumption that Schindler unlawfully discriminated against him.

[6] To rebut the presumption, Schindler merely had to articulate a legitimate, nondiscriminatory reason for the action. [7] Schindler met its burden by offering evidence that a downturn in work required some layoffs and that it used a combination of factors in deciding whom to discharge.

[8] To show that Schindler's reason was pretextual, Nidds had to show both that it was false and that discrimination was the real reason. [9] Nidds's evidence was insufficient to raise a genuine issue of fact as to whether Schindler's reasons for the layoff were pretextual.

[10] A prima facie case of retaliation requires the plaintiff to show that he engaged in a protected activity, that his employer subjected him to adverse employment action, and that there is a causal link between the protected activity and the employer's action. Nidds's termination was an adverse employment action. [11] Nidds submitted sufficient evidence to create an inference of a "causal link," and the temporal proximity was sufficient to satisfy that requirement. [12] However, Schindler met its burden of articulating a legitimate reason for the layoff. Nidds failed to produce enough evidence from which a reasonable factfinder could conclude that Schindler's articulated reason was a pretext for retaliatory termination.

[13] A district court does not abuse its discretion by denying further discovery if the movant has failed to diligently pursue discovery in the past. [14] Nidds's lack of diligence to pursue discovery while the district court postponed its ruling on the motion of summary judgment precluded a finding that the district court abused its discretion.

Judge Noonan dissented, writing that the district court should not have granted summary judgment because a reasonable juror could have inferred from the facts that Schindler's reason for laying off Nidds was pretextual.

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## COUNSEL

Kendra L. Tanacea, San Francisco, California, for the plaintiff-appellant.

Rebecca Hull, Cynthia H. Plevin, Sedgwick, Detert, Moran & Arnold, San Francisco, California, for the defendant-appellee.

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## OPINION

SNEED, Circuit Judge:

Raymond Vincent Nidds appeals the grant of summary judgment in favor of his former employer, Schindler Elevator Corp. ("Schindler"), on his California Fair Employment and Housing Act ("FEHA") discrimination and retaliation claims. Federal jurisdiction is based on the parties' diversity of citizenship. Nidds also contests the district court's refusal to continue discovery before ruling on Schindler's summary judgment motion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

*Appendix B*

I.

## *BACKGROUND OF THE DISPUTE*

Nidds was a highly experienced, 54-year-old elevator service mechanic when he was hired by Schindler on June 13, 1988, and assigned to a downtown San Francisco service route. He was well-liked by his customers and his employer. Sometime in 1989 or 1990, Schindler's District Service Supervisor, Darrel Graham, allegedly told another service mechanic that he intended to get rid of all the "old timers" because they would not "kiss my ass." On October 5, 1990, Nidds and two other service mechanics were laid off. Graham wrote a favorable letter of recommendation for Nidds, and assured him that he would be considered for reemployment should business pick up. Shortly thereafter, his route was assigned at least in substantial part to 25-year-old Greg Cardenas, a former "helper" (an apprentice) employed by Schindler since 1985, who had passed his mechanic's test only 30 days earlier.

When Nidds learned that his route had been assumed by Cardenas, he filed an age discrimination complaint with the California Department of Fair Employment and Housing ("DFEH") on December 7, 1990. The investigation by DFEH revealed that Schindler laid off a total of eleven employees during 1990 due to a purported downturn in business. Sixty-four percent of those employees were over 40 years old. Asked how it selected employees for layoff, Schindler initially responded that seniority was the basis, and later, that it looked at a combination of factors, including seniority, job performance, special expertise, and competence. Schindler explained that Nidds was overall a very good employee but that he was less proficient on the modern "Solid State" equipment than other mechanics. As to Nidds' claim that there was no downturn in work in the company's service arm, Schindler explained that the downturn was in the construction arm, and that its practice was to shift its best employees from construc-

tion to service to avoid losing them to competitors, and to lay off employees from service to compensate. In November 1991, the DFEH informed Nidds that it would not pursue his claim.

Earlier Schindler had made two offers to rehire Nidds, the first for a route in Fresno, the second for an Oakland route; Nidds rejected the first but accepted the latter in January 1991. Schindler soon began receiving complaints from the manager of 1800 Harrison, a building that accounted for 60% of the revenues on the Oakland route. Schindler also allegedly received complaints from its troubleshooters, who said that Nidds needed their help more than did other mechanics.

In March 1992, Nidds was purportedly asked by a supervisor whether he had dropped his DFEH complaint, to which he replied that he had not. Later that month, Nidds' attorney informed Schindler of Nidds' intention to sue the company for age discrimination. In April 1992, Schindler removed Nidds from the Oakland route and assigned him to the restoration department. Although his compensation was unaffected, Nidds characterizes this transfer as a demotion. In response, Nidds filed a second complaint, charging age discrimination and retaliation, with the DFEH on June 10, 1992.

Schindler transferred Nidds again in June 1992, from the restoration department to a service route that included the Geneva Towers, an allegedly high-crime housing complex in San Francisco. On June 26, Nidds left Geneva Towers in the middle of the day after learning of riots at nearby Woodrow Wilson High School. Although he returned later in the afternoon to repair two malfunctioning elevators, his behavior annoyed Geneva Towers' management. A subsequent cascade of meetings and correspondence between Geneva Towers and Schindler resulted in a decision to remove Nidds from the route. Nidds, who went on vacation from July 2 to July 22, learned of this decision on his return. Shortly thereafter, on July 28, he was laid off for the second and final time.

*Appendix B*

Nidds filed his employment discrimination and retaliation complaint in California Superior Court on May 5, 1992. In June, Schindler removed the action to federal court based on the parties' diversity of citizenship. Following extensive discovery by Nidds' attorney and several discovery disputes during 1992 and 1993, the magistrate set a discovery cutoff date of November 1, 1993. On July 23, however, Schindler proceeded to move for summary judgment. Nidds requested a continuance so that he could depose several of Schindler's declarants and obtain additional documents. The district court denied the continuance in August, but deferred ruling on the summary judgment motion to allow Nidds to take three more depositions and to allow time for supplemental briefing. The depositions were never taken, and on November 17, 1994, the district court granted Schindler's motion for summary judgment on all of Nidds' claims. Nidds timely appealed.

II.

*THE AGE DISCRIMINATION CLAIM*

We review the district court's grant of summary judgment on both the age discrimination and retaliation claims de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996). We must determine whether, viewing the evidence in the light most favorable to Nidds, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

Nidds' FEHA age discrimination claim is based on his October 1990 layoff. FEHA reads in relevant part:

> It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age,

> except in cases where the law compels or provides for such action.

Cal. Gov't Code § 12941. California courts interpreting FEHA often look to federal cases interpreting the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. *See Stephens v. Coldwell Banker Commercial Group, Inc.*, 245 Cal. Rptr. 606, 609 (App. 1988). Therefore, we too rely on such cases where helpful.

An age discrimination case alleging disparate treatment, such as this one, involves shifting burdens of proof as follows:

> [A] plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

*Wallis v. J. R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (1986)); *see also Caldwell v. Paramount Unified Sch. Dist.*, 48 Cal. Rptr. 2d 448, 453-54 (App. 1995), *rev. denied* (1996). However, the burden of persuasion remains at all times with the plaintiff. *Washington v. Garrett*, 10 F.3d 1421, 1432 (9th Cir. 1994).

A. *The Prima Facie Case Barrier*

[1] "In order to show a *prima facie* case of discrimination, 'a plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." ' " *Sischo-Nownejad v.*

*Merced Community College Dist.*, 934 F.2d 1104, 1110 (9th Cir. 1991) (quoting *Lowe v. City of Monrovia*, 775 F.2d at 1005, quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). That evidence may be either direct or circumstantial, and very little is required. *Messick v. Horizon Indus. Inc.*, 62 F.3d 1227, 1229 (9th Cir. 1995); *Caldwell*, 48 Cal. Rptr. 2d at 454.

[2] To establish a prima facie case of age discrimination through circumstantial evidence, the plaintiff must show that he was:

(1) a member of a protected class [age 40-70];
(2) performing his job in a satisfactory manner;
(3) discharged; and
(4) replaced by a substantially younger employee with equal or inferior qualifications.

*Wallis*, 26 F.2d at 891 (quoting *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990)).

[3] The fourth element, however, has been treated with some flexibility: "We have held that the failure to prove replacement by a younger employee is 'not necessarily fatal' to an age discrimination claim where the discharge results from a general reduction in the work force due to business conditions." *Rose*, 902 F.2d at 1421; *see also Ewing v. Gill Indus., Inc.*, 4 Cal. Rptr. 2d 640, 645 (App. 1992). Rather, courts "require instead that the plaintiff show through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Rose*, 902 F.2d at 1421. This inference "can be established by showing the employer had a continuing need for his skills and services in that his various duties were still being performed," *Wallis*, 26 F.3d at 891 (internal quotation omitted), or by showing "that others not in her pro-

tected class were treated more favorably." *Washington*, 10 F.3d at 1434.[1]

[4] The district court ignored the flexibility these cases require and erred in concluding that to establish a prima facie case, Nidds was required to show that he was at least as qualified as his replacement. The court also erred by counting against Nidds the fact that he was not directly replaced by the younger employee, Cardenas. Under *Rose*, *Wallis*, and *Washington*, it is enough that Nidds' duties were substantially transferred to Cardenas.

[5] In summary, Nidds has shown that he was discharged; that he was performing satisfactorily; and that his duties continued to be performed by a substantially younger individual. Nidds therefore cleared the prima facie case barrier and established "a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (internal quotation omitted).

B. *Schindler's Burden*

[6] However, to rebut this presumption the employer must merely articulate a legitimate, nondiscriminatory reason for the action. *Id.*; *Wallis*, 26 F.3d at 892. Once the employer meets this burden, the presumption of discrimination drops away. *St. Mary's*, 509 U.S. at 507; *Wallis*, 26 F.3d at 892.

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[1] *See also Caldwell*, 48 Cal. Rptr. 2d at 455 (prima facie established where "(1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class") (internal quotation omitted); *Ewing*, 4 Cal. Rptr. 2d at 645 (in a reduction in force case, a discharged employee "need not show that he was replaced by a younger, newly hired employee; it is sufficient that the discharge occur in circumstances giving rise to an inference of age discrimination") (internal quotation omitted).

[7] Schindler met its burden by offering some evidence that a downturn in work required some layoffs, and that it used a combination of factors, including performance, technical qualifications, and seniority, in deciding whom to discharge. As a consequence, the burden returned to Nidds to show that Schindler's articulated reason was a pretext for discrimination.

C. *Pretext*

To demonstrate pretext, Nidds' burden essentially is to answer "the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his [age]." *St. Mary's*, 509 U.S. at 511 (quoting *Burdine*, 450 U.S. at 253); *Ewing*, 4 Cal. Rptr. 2d at 647 ("This burden now merges with the ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination"). On summary judgment, of course, Nidds' burden is only to produce enough evidence that would allow a reasonable factfinder to conclude that the true reason for his discharge was a discriminatory one.

[8] There are various ways to describe what is necessary to meet this burden. "The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." *St. Mary's*, 509 U.S. at 511; *Wallis*, 26 F.3d at 890 (plaintiff must produce "specific, substantive evidence of pretext," which must consist of more than the minimum necessary to establish a prima facie case). To show that an employer's reason is pretextual, plaintiff must show both that it is false, and that discrimination was the real reason. *St. Mary's*, 509 U.S. at 512 n.4.[2]

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[2]*See also Martin v. Lockheed Missiles & Space Co.*, 35 Cal. Rptr. 2d 181, 190 (App. 1994) ("[T]o meet an employer's sufficient showing of a legitimate reason for discharge the discharged employee, to avert summary judgment, must produce substantial responsive evidence that the

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Nidds argues that summary judgment against his claims was improper because of Schindler's shifting explanations for the October 1992 layoff. These alone, he insists, are enough to raise a genuine issue as to its discriminatory motives. He cites *Washington*, 10 F.3d at 1434 ("We note that, in the ordinary case, such fundamentally different justifications for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason"), and *Lindahl v. Air France*, 930 F.2d 1434, 1438-39 (9th Cir. 1991) (reasons for discharge not credible where they were vague, unsupported by the facts, and not articulated until the litigation commenced). However, the Supreme Court has made it clear that the plaintiff must do more than show that the reason given was false; he must also offer some evidence that the real reason was discriminatory. *St. Mary's*, 509 U.S. at 512 n.4.

[9] We hold, therefore, that Nidds' evidence is insufficient to raise a genuine issue of fact as to whether Schindler's reasons for the layoff were pretextual. First, the reasons given by Schindler are not incompatible, and therefore not properly described as "shifting reasons." "Lack of work" was the reason given for the layoffs in general, while Nidds' lack of seniority and poorer performance relative to other mechanics were the reasons given for *his* layoff specifically. Second, Nidds' affidavits challenging Schindler's purported downturn in work are insufficient to raise a genuine issue in light of Schindler's evidence that it did in fact lay off eleven employees in 1990. Third, Nidds' evidence that he received satisfactory performance evaluations is not inconsistent with

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employer's showing was untrue or pretextual") (internal quotation omitted); *Ewing*, 4 Cal. Rptr. 2d at 647 ("[Plaintiff] may succeed in [showing pretext] either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence").

Schindler's evidence that Nidds was chosen for layoff not because he was a poor performer, but because his technical skills on some equipment were not as good as those of his colleagues.

Moreover, even if the evidence supported an inference that the reasons given by Schindler were not its actual reasons, there is insufficient evidence that the actual reason was a discriminatory one. Nidds cites the "old timers" comment allegedly made by Graham as evidence of a discriminatory motive. That comment, however, was very much like the comments in *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993), which the court held did not support an inference of discriminatory motive. In *Nesbit*, the plaintiff's immediate supervisor commented to Nesbit that "[w]e don't necessarily like grey hair." The court found that the "comment was uttered in an ambivalent manner and was not tied directly to Nesbit's termination," and upheld the grant of summary judgment in favor of the employer. *Id.*

Similarly, Graham's comment was ambiguous because it could refer as well to longtime employees or to employees who failed to follow directions as to employees over 40. Moreover, the comment was not tied directly to Nidds' layoff. Like the comment in *Nesbit*, therefore, it is weak evidence and not enough to create an inference of age discrimination.

Also distinguishable is *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 10, 1996) (No. 96-70), upon which Nidds relies. There, we reversed the grant of summary judgment in favor of the employer where the employee had alleged "that on three separate occasions, when he asked to be considered for president, he was told the Board wanted somebody younger for the job" and had submitted evidence to the same effect in the form of meeting notes and an affidavit of a coworker. Nidds' evidence, by contrast, is neither as direct

nor as weighty. It is not enough to support an inference of age discrimination.

III.

*THE RETALIATION CLAIM*

A. *Prima Facie Case*

[10] In a retaliation case, the burden shifting scheme is much the same as that in an age discrimination case. *Lam v. University of Hawaii*, 40 F.3d 1551, 1559 & n.11 (9th Cir. 1994). A prima facie case requires the plaintiff to show "that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." *Flait v. North Am. Watch Corp.*, 4 Cal. Rptr. 2d 522, 528 (App. 1992).

Nidds' complaints to the DFEH were protected activity because California law specifically prohibits employers from taking adverse actions against employees as a result of their filing a complaint alleging FEHA violations. *See* Cal. Gov't Code § 12940(f). Although we decline to view Nidds' transfer to the restoration department as an adverse employment action,[3] his ultimate termination on July 28, 1992, certainly was.

[11] Moreover, Nidds has submitted sufficient evidence to create an inference of a "causal link" between Nidds' complaints and his July 1992 layoff. The layoff occurred only four months after his supervisor allegedly asked him if he had

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[3]*See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n.6 (9th Cir. 1994) (questioning whether transfer from swing shift to day shift was "adverse" employment action where employee "was not demoted, or put in a worse job, or given any additional responsibilities"), *cert. denied*, 115 S. Ct. 733,(1995); *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987) (no adverse employment action where temporary transfer did not result in loss of salary or benefits).

dropped his first discrimination complaint (March 1992) and only one month after he filed his second complaint (June 10, 1992). The temporal proximity of events was sufficient to satisfy the third element of the prima facie case. *See Flait*, 4 Cal. Rptr. 2d at 529-30 (sufficient causal link where supervisor who terminated employee had made sexist comments to another employee and fired employee five months after a confrontation).

B. *The Employer's Burden*

[12] Schindler, however, also met its burden of articulating a legitimate reason for the layoff. It was that the management of Geneva Towers requested that Nidds be removed from the route, and that Schindler had no other place for him. Thus, the deciding question again is whether Nidds has produced enough evidence from which a reasonable factfinder could conclude that Schindler's reason was a pretext for retaliatory termination. We hold that again Nidds has failed to make that showing.

C. *Pretext*

The crux of Nidds' argument is that Schindler encouraged the management of Geneva Towers to complain about Nidds so that Schindler would have a reason to terminate Nidds in retaliation for his filing his second age discrimination claim and intent to sue letter. For support, he cites the letter and testimony of Arthur Hutton, Geneva Towers' administrator, concerning an incident in which Nidds purportedly failed to respond to a service call.

In Hutton's letter to Ken Robinson of Schindler, dated July 21, 1992, he stated: "Pursuant to our conversation of today, we feel that it is in both our interest to relieve Mr. Ray Niddes [sic] from his duties at Geneva Towers Apartments. The environment seems to dictate whether he is able to perform his duties on a day-to-day basis." Hutton testified at his deposi-

tion that "I believe that I wrote that letter immediately — well, I believe that I spoke with Ken Robinson immediately after I became aware that the incident took place. Shortly after that, if my recollection serves me correctly, I proceeded to write the letter." Hutton testified further that "[Robinson] suggested that I write a letter expressing what we talked about over the phone."

Nidds argues that because he was on vacation from July 2 through July 21, this evidence shows that "another Schindler mechanic failed to respond to the Geneva Towers' service call. Then Robinson, seeking to find a pretext for Nidds' termination, asked Hutton to write a letter regarding *Nidds'* failure to service the route."

Nidds' proposed inference is not one that a reasonable fact-finder could make. Hutton's own testimony indicates that he called Robinson and then wrote to him when he *became aware* of the incident, not when it actually happened. Moreover, the incident that prompted the call was clearly the June 26 incident when Nidds left Geneva Towers after hearing about a gang riot at the nearby high school: Hutton stated at deposition that "I do know that the information that I received indicated that Mr. Nidds didn't want to come out because he had heard that there had been violence, gang violence, during the course of that day." It is unlikely that the same incident recurred a month later with the same response from some other Schindler mechanic. Although the time lag between the June 26 incident and Hutton's phone call of about July 21 remains unexplained, the reasonable inference from Hutton's testimony is that he did not learn of the incident until the latter date.

Other evidence also supports Schindler's explanation that Geneva Towers was dissatisfied with Nidds' performance. Schindler employee Larry Scharfe stated in a declaration that "Mr. Gray [of Geneva Towers] expressed some concerns regarding Mr. Nidds leaving his job. He said that he and oth-

ers in management at the apartment complex were not satisfied with the service or the attitude of the new service person, Mr. Nidds." Schindler employee Ken Robinson stated that "Mr. Gray said that he or someone else would set out their concerns regarding Mr. Nidds in writing and send them to Schindler." In a June 26, 1992, memo to Graham, Robinson explained that "At our June 25, 1993 meeting, Mr. Gray expressed his concern that Geneva Towers was merely a number on Mr. Nidds' route sheet. Mr. Gray told me that he was concerned that the level of service would decline now that Nidds had been assigned because Mr. Nidds did not care about Geneva Towers' problems."

In light of this evidence, neither Hutton's letter nor his testimony are sufficient to allow a reasonable factfinder to conclude that Schindler used Geneva Towers' concerns as a pretext to discharge Nidds. We therefore affirm summary judgment on this claim as well.

## IV.

## *THE RULE 56(f) MOTION*

[13] "We review a district court's denial of a [Fed. R. Civ. P. 56(f)] request for further discovery by a party opposing summary judgment for abuse of discretion." *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 6, 1996) (No. 95-1810). The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, *id.*, and that it would prevent summary judgment. *Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). "Moreover, the district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past." *Conkle*, 73 F.3d at 914 (internal quotation omitted).

[14] A problem might exist had the district court denied Nidds' motion for a continuance where Nidds had outstanding

discovery requests and November, the cutoff date for discovery, was still several months away. Here, however, the court postponed ruling on the summary judgment motion for over a year to give Nidds time to take three depositions. Yet, Nidds never took the depositions. This lack of diligence precludes a finding that the district court abused its discretion. *See, e.g., Hauser v. Farrell*, 14 F.3d 1338, 1340-41 (9th Cir. 1994) (denial of Rule 56(f) motion proper in light of failure to depose witness within 27 months of filing suit); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) (failure to take advantage of additional month of discovery granted by district court showed lack of diligence).

## V.

## *CONCLUSION*

Because Nidds' evidence of discrimination and retaliation is insufficient, we affirm the grant of summary judgment in favor of Schindler. We also hold that the district court did not abuse its discretion in denying Nidds' motion for a continuance of the summary judgment hearing.

AFFIRMED.

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NOONAN, Circuit Judge, dissenting:

We all agree that the district court erred in finding that Nidds had not made a prima facie case. He had, and the burden shifted to Schindler to produce a nonpretextual nondiscriminatory reason for his discharge. What we disagree about is whether Nidds produced enough evidence from which a reasonable juror could have inferred that Schindler's reason was pretextual and that in fact it laid him off because of his age.

*Appendix B*

Nidds had two witnesses (not one, as the court appears to assume) whose evidence was that Graham, the district superintendent, wanted to get rid of the "Old Timers." The court in its opinion suggests that Graham's comment was "ambiguous." There was not much ambiguity about it. That the Old Timers would not kowtow to Graham was connected by him to their length of service; and length of service in this industry meant being over forty. In his comment to Julia Stuart, Schindler's Assistant Field Supervisor, Graham said that he wanted to replace the Old Timers with "new blood" — another distinct reference to age. Even if I agreed with the court that the remark was ambiguous, a reasonable juror could resolve whatever ambiguity there is by an inference in Nidds' favor. We're operating under circuit law which is unequivocal in setting "a high standard for the granting of summary judgment in employment discrimination cases." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 295, 65 U.S.L.W. 3286 (Oct. 15, 1996). The standard should not unaccountedly be lowered.

Nidds' evidence of discriminatory intent is properly taken into account with Schindler's shifting explanation of why it laid him off. Schindler said, first, that it was senority and stuck to that in a proceeding before the DFEH; finally, when pressed, a year after the layoff Schindler said Nidds was a poor performer on the newer Solid State equipment. Yet when Schindler took Nidds back only four months later, it assigned him to a service route in Oakland which had over twice as many units of Solid State equipment as his old route, and Graham said that Nidds was "the most qualified person at that time." A reasonable jury could easily infer that Schindler was cloaking the discrimination already expressed by Graham with these made-up stories of why the company laid off this old and experienced and efficient employee whom Graham had rated as "excellent."

As to retaliation, it is Nidds' evidence that assignment to Geneva Towers was the company's not very nice and not very

subtle way of dumping employees it wanted to punish; and it was the convenient prelude to pushing him out altogether. Schindler put him there shortly after Schindler had pointedly inquired about his discrimination filing before the DFEH. Within two months, Nidds was fired from this route as a result of a letter which in so many words indicates that the request of Geneva Towers to remove Nidds was coordinated with Schindler management. The opinion of the court turns somersaults trying to explain why Nidds' evidence on this point should not be believed. The opinion includes a pure speculation as to whether two incidents of gang violence in a gang-infested neighborhood could occur within a month. It's good jury reasoning. It's highly inappropriate for an appellate body or for a district court that is supposed to respect the different functions of judge and jury.

We are dealing here not with some procedural rule or even with a statutory direction. We are under compulsion of a constitutional command entitling persons to trial by jury as it existed at common law. U.S. Const. amend. VII. The time at which the common law right existed is the time when the Seventh Amendment was adopted. *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996). The test is historical. *Id.* A wealth of new scholarship indicates how sensitive to jury verdicts even a fairly high-handed but wise judge such as Lord Mansfield was at the time at the time of our Revolution. *See, e.g., Olney v. Allen*, (K.B. 1783), *in* 1 *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 354-55 (James Oldham, ed. 1992); *Harris v. Worsley*, (K.B. 1773), *in* 2 *id.* 1129-1130 (the jury verdict, upheld by Mansfield, was in his words: "To the astonishment of every body").

It can happen that a judge distrustful of a jury's sympathy for the hard luck of a plaintiff, or a judge conscious that he is the master of the facts and can speed up the process by killing a case early, will enter summary judgment where there are facts open to different interpretation by the jury. However

benevolent the judge's motive, the judge is denying the litigants their constitutional right to trial by their peers. We should be the last to give countenance or comfort to such a departure from the basic structure of our law. Therefore, I dissent.

## APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED NOVEMBER 17, 1994

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-92-2177-VRW

RAYMOND VINCENT NIDDS,

Plaintiff,

v.

SCHINDLER ELEVATOR CORPORATION, a corporation and DOES 1 through 50, inclusive,

Defendants.

1994 U.S. Dist. LEXIS 16592

November 17, 1994, Filed

JUDGES: WALKER

OPINION BY: VAUGHN R. WALKER

OPINION: ORDER GRANTING SUMMARY JUDGMENT.

I.

On June 13, 1988, defendant, Schindler Elevator Corporation ("Schindler"), hired plaintiff, Raymond Nidds, to work as an elevator service mechanic in San Francisco. At the

time, Nidds was 54 years old. During his employment with Schindler, Nidds was a member of the International Union of Elevator Constructors, Local No. 8. He worked under the terms of a collective bargaining agreement between Schindler and that union.

On October 5, 1990, plaintiff was laid off from his job with Schindler allegedly for lack of work, lack of seniority and comparatively weak performance. After plaintiff's termination, Schindler allocated plaintiff's workload to Gregory Cardenas, a younger employee in his twenties.

Approximately thirteen weeks later, a mechanic's position opened up in Fresno. In accordance with provisions of the union contract, one of plaintiff's former supervisors, Darrel Graham, advised the union of the Fresno opening. Graham asked Ellis Smith, the union's business manager, to contact plaintiff to see if he would take the job. Shortly thereafter, Smith informed Graham that plaintiff declined the Fresno position.

When another mechanic's position opened up in Oakland, Graham again asked the union whether Nidds might be interested in the job. Nidds accepted the job, and on January 29, 1991, again became an employee of Schindler.

Between January 29, 1991, and April 15, 1991, Schindler alleges that it received complaints about Nidds' job performance from customers and co-workers of Nidds. Consequently, on April 15, 1992, Schindler transferred Nidds from the Oakland route to Schindler's Modernization/Restoration Department.

In July 1992, a service route located generally in South San Francisco became available. According to Schindler, based

upon Nidds' performance, it became apparent to Schindler that Nidds had less difficulty working on older model elevators which were not electronically operated than on more modern equipment. Since the equipment on the South San Francisco route was of an older vintage, Schindler offered plaintiff this newly available service route. Nidds accepted.

Shortly after plaintiff began working this new route, Schindler contends that it received a complaint from management at Geneva Towers, an apartment complex which made up 40% of Nidds' new route. Nidds was removed from the route. According to Schindler, because there was no other route to which Nidds could be assigned, Schindler laid off Nidds for a second time.

As a result of the foregoing, plaintiff filed a complaint alleging age discrimination and retaliation in violation of the California Fair Employment and Housing Act ("FEHA"), Gov. Code 12900 *et seq.*, and in violation of fundamental public policy expressed in Government Code 12941. In addition, plaintiff brings causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress and breach of the covenant of good faith and fair dealing.

In August 1993, defendants moved for summary judgment pursuant to FRCP 56 on each cause of action. At the time, plaintiff complained that the motion was premature because he had not yet had an opportunity to depose certain persons. Based on that assertion, the court deferred decision on the motion in order to give plaintiff a chance to conduct the depositions of James White, Bill Mitchell and Steve Morse. By order dated September 1, 1993, the court also ordered all other discovery stayed, and established a schedule for the submission of supplementary briefs.

*Appendix C*

The supplementary briefs have been filed by the parties. Plaintiff never conducted the permitted depositions, however, and although plaintiff continues to complain that he needs further discovery to oppose the present summary judgment motion, conspicuously absent from his papers is any explanation why the authorized depositions were not taken.

Upon consideration of all papers submitted and all oral arguments heard, the court hereby: (1) GRANTS defendants' motion on counts one and two for age discrimination; (2) GRANTS defendants' motion on count three for intentional infliction of emotional distress; (3) GRANTS defendants' motion on count four for negligent infliction of emotional distress; (4) GRANTS defendants' motion on count five for breach of the covenant of good faith and fair dealing; and (5) GRANTS defendants' motion for summary judgment on counts six and seven for retaliation for filing a discrimination complaint against an employer.

A.

In the first cause of action, plaintiff alleges that he was terminated from Schindler in 1990 because of his age, in violation of the FEHA. The second cause of action is a public policy claim alleging the same facts. Defendants move for summary judgment on both these counts on the grounds that: (1) plaintiff has no direct evidence of age animus; (2) plaintiff cannot present circumstantial evidence of intent to discriminate; (3) plaintiff cannot make out a prima facie case of age discrimination; (4) the facts of plaintiff's termination do not support an inference of discrimination; and (5) even if plaintiff can establish a prima facie case of age discrimination, defendant has adequately articulated a reason for plaintiff's layoff.

*Appendix C*

In any disparate treatment cause of action, such as disparate treatment based on age, proof of intent is required. Intent may be proved by either direct evidence of discriminatory intent or circumstantial evidence that a discriminatory intent underlay an adverse employment action. *See, e.g., Fragante v. City and County of Honolulu*, 888 F.2d 591, 595-96 (9th Cir. 1988), *cert. denied*, 494 U.S. 1081, 108 L. Ed. 2d 942, 110 S. Ct. 1811 (1990); *Rosenfeld v. Southern Pac Co.*, 444 F.2d 1219, 1223 (9th Cir. 1971).

1.

In the case at bar, defendants correctly argue that there is no direct evidence of age animus. For example, at his own deposition, when asked if he had ever heard Schindler refer to his or any one else's age, plaintiff testified as follows:

> Q. Did you ever hear any references to your age made by any Schindler supervisor?
>
> A. No, I can't recall.
>
> Q. Did you ever hear references made to anyone else's age by any Schindler supervisor?
>
> A. Directly, no.

*See* Nidds Depo at 173:20-25, in Andrews Decl. Ex. A.

Even Darrel Graham's statement that he was going to get rid of some of the "old timer" service mechanics does not provide direct evidence of discriminatory intent. The declaration does

not state when the alleged statement was made, to whom it was made or the context in which it was made. Therefore, it is impossible to tell whether Graham supposedly said that "old timer" service mechanics were to be laid off because of their ages or for other reasons, such as failure to keep up with new technology and equipment. If the latter is the case, then Graham's statement does not indicate unlawful discriminatory intent based on age, but rather lawful discrimination based upon performance.

2.

Given the absence of direct evidence of age animus, the court now turns to the existence of circumstantial evidence of discriminatory intent. Because the objectives of FEHA are identical to those of Title VII, California courts have expressly adopted Title VII legal standards in interpreting and applying FEHA. *Walker v. Blue Cross of Cal*, 4 Cal. App. 4th 985, 997-98, 6 Cal. Rptr. 2d 184, 192 (1992); *Levy v. Regents of the Univ of Cal*, 199 Cal. App. 3d 1334, 1343, 245 Cal. Rptr. 576, 581 (1988), *cert. denied*, 488 U.S. 893, 102 L. Ed. 2d 221, 109 S. Ct. 231 (1988).

In *McDonnell Douglas v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), the Supreme Court first explained the manner in which intent to discriminate can be proved using circumstantial evidence. Plaintiff must first establish a prima facie case of age discrimination by proving that: (1) he was within a protected class (over the age of forty); (2) he was qualified for and performing his job in a satisfactory manner; (3) he was laid off; and (4) he was replaced by a younger employee with equal or inferior qualifications, or his termination occurred under circumstances giving rise to an inference of unlawful discrimination. *Id.* at 802; *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Levy*, 245 Cal. Rptr. at 581.

*Appendix C*

If plaintiff is able to establish a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the termination. The employer need only produce enough evidence to establish a legally sufficient explanation for its actions. *Levy*, 245 Cal. Rptr. at 581. After the employer articulates a nondiscriminatory reason, the presumption of discrimination disappears. *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407, 113 S. Ct. 2742, 2749 (1993). Plaintiff then has the ultimate burden of proving that the reason offered by defendant is pretextual, and that the defendant intentionally discriminated against the plaintiff. *Id.*; *Stephens v. Coldwell Banker Commercial Group, Inc*, 199 Cal. App. 3d 1394, 1400, 245 Cal. Rptr. 606, 609 (1988).[1]

In order for a Title VII plaintiff to survive defendants' summary judgment motion, however, the burden is slightly different. As the Ninth Circuit recently explained in *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993), to survive summary judgment plaintiff must both make a prima facie case and raise a genuine issue whether defendants' proffered nondiscriminatory explanation is pretextual. If plaintiff does not demonstrate a triable issue that defendants' reasons are

1. In *Hicks*, the Supreme Court clarified the operation of the *McDonnell Douglas* burden shifting procedure. The Eighth Circuit had held that once a plaintiff establishes a prima facie case and reveals any nondiscriminatory reasons as mere pretext, plaintiff is entitled to judgment as a matter of law. The Supreme Court disagreed. The Court held that once the defendant articulates a nondiscriminatory reason for its conduct, the presumption of discrimination disappears entirely. *Hicks*, 113 S. Ct. at 2749. The plaintiff is then left to convince the trier of fact that he was the victim of intentional discrimination. The Court noted that where a plaintiff makes out a prima facie case and demonstrates the pretextual nature of the defendant's reason, although a verdict for plaintiff may be permissible, it is not required as a matter of law. *Id.*

pretextual, there is nothing left to support plaintiff's claim, as the presumption created by plaintiff's prima facie case disappears when the defendant comes forward with a nondiscriminatory explanation.

Plaintiff objects to this analysis of his burden on summary judgment, citing *Moisi v. College of the Sequoias Community College Dist*, 19 Cal. App. 4th 564, 25 Cal. Rptr. 2d 165 (Cal. App. 1993).[2] The *Moisi* court concluded that in order to survive a defendant's summary judgment motion, all a FEHA plaintiff need do is to make out a prima facie case. Therefore, even if defendant has articulated a nondiscriminatory explanation for its conduct, plaintiff need not demonstrate that the reason is pretextual, so long as a prima facie case has been established. *Id.* at 171-72.

When sitting in its diversity jurisdiction, a federal district court is required to apply state substantive law. *Erie Railroad Co v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). Because presumptions and burdens of proof are generally considered to be substantive for purposes of the *Erie* doctrine, state law must be employed for such issues. The role of the district court is not, however, to defer to all state court decisions; instead, the federal court need only "follow the substantive law decisions of the state's highest court." William W. Schwarzer, A. Wallace Tashima & James Wagstaffe, *Federal Civil Procedure Before Trial* at 1:38 (The Rutter Group, 1993) (emphasis in original). If the state's highest court has yet to decide the issue, the district court must attempt to predict how the state supreme court would rule. *Id.* In making this prediction, the district court "may properly consider the opinions of lower state courts * * *." *Id.* (emphasis added).

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2. In denying review of the court of appeal's decision in *Moisi*, the California Supreme Court ordered the opinion not be officially published.

*Appendix C*

Faced with the conflicting holdings of *Washington* and *Moisi* regarding the appropriate burdens on a summary judgment motion, this court must determine which should control. The court concludes that were the California Supreme Court faced with a choice between the approach adopted by the *Washington* court and the procedure mandated by the *Moisi* court, the Supreme Court would likely follow *Washington*. First, the California supreme court has already expressed disapproval over *Moisi* by ordering it not officially published, preventing this court from relying on it. Cal. Rules of Ct. R. 977. Also, although the *Washington* and *Moisi* courts reached very different results, both based their decisions on the recent United States Supreme Court decision in *Hicks*. Other federal circuit courts interpreting *Hicks* have reached the same conclusion as the Ninth Circuit in *Washington* — i.e., in order to oppose a summary judgment motion, a plaintiff must not only make out a prima facie case, but must also demonstrate that defendants' proffered nondiscriminatory reason is pretextual. *See Martin v. Nanny and the Newborns, Inc.*, 3 F.3d 1410 (10th Cir. 1993); *Vega v. Kodak Caribbean*, 3 F.3d 476 (1st Cir. 1993); *Kassaye v. Bryant College*, 999 F.2d 603 (1st Cir. 1993). Because California courts have expressly adopted federal law in interpreting FEHA, this collection of federal case law interpreting *Hicks* is particularly persuasive.

Defendants contend that plaintiff has failed to establish a prima facie case of age discrimination because Nidds cannot prove that he was replaced by a substantially younger employee with equal or inferior qualifications. The evidence establishes beyond any triable question that Greg Cardenas, the younger service mechanic who eventually assumed the majority of the downtown San Francisco service route previously serviced by Nidds, was a more versatile, capable, technically proficient

mechanic than plaintiff. Plaintiff's supervisor noted that Nidds, more often than other mechanics, had difficulty repairing elevators assigned to him and had to be helped by one of the other servicemen. Even his co-workers acknowledged that plaintiff needed more technical assistance, especially on the newer, more technically sophisticated equipment, than Cardenas. *See* White Decl. PP. 6-8; Mitchell Decl. P. 7; Moore Decl. PP. 6-7. In short, based upon the information from plaintiff's supervisor and plaintiff's co-workers, Schindler management reasonably concluded that Nidds' work was not as good as that of Cardenas, and plaintiff has failed to produce any evidence to the contrary.[3]

Plaintiff argues that according to California law, a discharged employee is not required to show that the replacement employee had equal or inferior qualifications in order to make out a prima facie case of discriminatory discharge. *See Moisi*, 25 Cal. Rptr. 2d at 171; *Hunio v. Tishman Constr Corp of Cal*, 14 Cal. App. 4th 1010, 18 Cal. Rptr. 2d 253, 260 (Cal. App. 1993).[4] Therefore, plaintiff claims to have adequately established the prima facie elements of an age discrimination claim by proving that: (1) he was during all relevant times over forty years of age and therefore a member of a protected class; (2) he

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3. Although plaintiff was provided an opportunity to depose Mr. Mitchell, Mr. White, and Mr. Morse in order to rebut their testimony, plaintiff inexplicably elected not to do so. Accordingly, the court has little sympathy for plaintiff's continuing cries that additional discovery is needed to oppose the present motion.

4. *Hunio* is improperly cited as authority because review was granted. In plaintiff's original opposition papers, plaintiff had also cited *Venuti v. Superior Court*, 232 Cal. App. 3d 1463, 284 Cal. Rptr. 163 (1991), for this proposition. *Venuti*, however, is not good law. It has been depublished by the California Supreme Court and should not have been cited.

was performing in a satisfactory manner; (3) he was discharged; and (4) he was replaced by the substantially younger Cardenas.[5]

It is true, as plaintiff notes, that both *Moisi* and *Hunio* describe the fourth element of the prima facie case as only requiring proof that the replacement employee was not in the protected class. Neither case is citable authority, however. In addition, in setting out the four prima facie elements, both cases provide citations to *McDonnell Douglas*. As mentioned above, the *McDonnell Douglas* test clearly requires plaintiff to establish that the replacement employee possessed skills equivalent or inferior to those of the plaintiff. *McDonnell Douglas*, 411 U.S. at 802.

Therefore, it appears that in describing the prima facie case of *McDonnell Douglas*, the *Moisi* and *Hunio* courts simply misstated the fourth requirement. This conclusion is supported by the fact that neither of the two courts makes any mention that California courts have departed from the *McDonnell Douglas* test. Furthermore, other California state courts, as well as federal courts interpreting California law, have concluded that the prima facie case for a FEHA claim does require plaintiff to show that he was at least as qualified as his replacement, *see, e.g., Nesbit v. Pepsico, Inc*, 994 F.2d 703, 704 (9th Cir. 1993); *Rose v. Wells Fargo Bank*, 902 F.2d 1417 (9th Cir. 1990); *Anderson*, 656 F.2d at 531-33; *Levy*, 245 Cal. Rptr. at 581, or that his termination occurred under circumstances at least giving rise to an inference of unlawful discrimination. *Stephens*, 245 Cal. Rptr. at 609; *Levy*, 245 Cal. Rptr. at 576.

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5. Plaintiff also attempts to argue that the existence of a "substantial difference in the ages" between plaintiff and Cardenas is circumstantial evidence giving rise to an inference of age discrimination. As support, plaintiff cites the depublished *Venuti*, 284 Cal. Rptr. at 1475-76.

*Appendix C*

Another shortcoming of plaintiff's prima facie case is that Schindler never hired anyone to "replace" Nidds. An employe is deemed to be "replaced" when a new person, not previously employed by the defendant, is hired to assume the former employee's job. *Selby v. Pepsico*, 784 F. Supp. 750 (N.D. Cal. 1991), *aff'd*, 994 F.2d 703 (9th Cir. 1993). Cardenas was not a new hire. He had worked for Schindler in San Francisco longer than plaintiff and was merely assigned to cover parts of the route which Nidds had worked after the company laid off Nidds. Thus, Cardenas cannot be considered to have "replaced" plaintiff.

Even assuming that plaintiff could establish a prima facie case of age discrimination, the court must still grant defendants' summary judgment motion because defendant has adequately articulated a legitimate, nondiscriminatory reason for plaintiff's termination, and plaintiff has not raised a genuine issue regarding the pretextual nature of that reason.

During the 1988-1990 time frame, Schindler experienced a reduction in the number of service contracts and construction contracts for new buildings in the San Francisco area. *See* Graham Decl. P. 4. This reduction in work necessitated a corresponding reduction in its work force. *Id.* As a result, superintendents at Schindler were asked to select individuals to be laid off based on their performance relative to that of other employees. *Id.* Plaintiff was among one of those selected for termination. The law clearly states that a reduction in work constitutes a legitimate, nondiscriminatory reason for a layoff. *Allison v. Western Union Tel Co*, 680 F.2d 1318 (11th Cir. 1982). Plaintiff has failed to submit evidence that demonstrates this reason was pretextual.

Accordingly, the court GRANTS defendants' motion for summary judgment on counts one and two for age discrimination.

B.

Defendants also allege that the third and fourth causes of action for intentional and negligent infliction of emotional distress and negligent infliction of emotional distress should be dismissed as a matter of law.

1.

The elements of an intentional infliction of emotional distress claim are: (1) extreme and outrageous conduct by defendant; (2) intention to cause, or reckless disregard of the probability of causing, emotional distress; and (3) actual and proximate cause of severe emotional distress. *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209, 185 Cal. Rptr. 252, 259, 649 P.2d 894 (1982).

Defendants contend that, based upon plaintiff's testimony, there has been no extreme and outrageous conduct. To be outrageous, conduct must be so horrendous that it exceeds all bounds of behavior usually tolerated in a civilized society. *Id.* Liability "does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities." *Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 1122, 252 Cal. Rptr. 122, 139, 762 P.2d 46 (1988) (quoting *Restatement (Second) of Torts* at 46 cmt d), *cert. denied*, 490 U.S. 1084, 104 L. Ed. 2d 670, 109 S. Ct. 2110 (1989).

Applying the foregoing legal standard, the court finds that no reasonable jury could conclude that the acts which plaintiff

recounted in his depositions rise to the level of actionable "outrageous" conduct:

> Q. At the time that you were going to be laid off, what were Mr. Graham's words?
>
> A. We're laying you off because of economic reasons, and because you were the last one hired.

*See* Andrews Decl. Ex. A at 113:9-12.

> Q. Was there anything about the tone in Darrel Graham's voice that was humiliating?
>
> A. No.

*Id.* at 342:25-343:1. Courts have recognized that the mere fact that the layoff occurred does not by itself illustrate outrageous behavior. *See, e.g., Ankeny v. Lockheed Missiles & Space Company*, 88 Cal. App. 3d 531, 536, 151 Cal. Rptr. 828, 831 (1979); *Cornblith v. First Maintenance Supply Co*, 268 Cal. App. 2d 564, 74 Cal. Rptr. 216, 217-18 (Cal. App. 1968). Thus, plaintiff has failed to raise any issue of extreme and outrageous conduct.

Plaintiff responds that "discrimination, by its very nature, is 'outrageous' conduct and constitutes the outrageous behavior element required by this tort." In support of his argument, plaintiff cites *Fisher v. San Pedro Peninsula Hosp*, 214 Cal. App. 3d 590, 618, 262 Cal. Rptr. 842, 858 (1989), in which the court held that a properly pleaded claim for sexual harassment

alleges the type of "outrageous behavior" necessary to support a cause of action for intentional infliction of emotional distress. The court reasoned that California's Fair Employment and Housing Commission "infers a large measure of emotional injury from sexual harassment since sexual harassment is inherently oppressive and malicious. * * * By its very nature, sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society." 262 Cal. Rptr. at 857-58. Thus, the holding in *Fisher* is limited to sexual harassment cases.

*Fisher* does not hold, and plaintiff fails to cite any cases which do hold, that allegations of age discrimination or retaliation are per se outrageous. A mere allegation of discrimination does not necessarily satisfy the "outrageous behavior" requirement for a claim of intentional infliction of emotional distress. Similarly, the court in *Ankeny* held that a complaint alleging discrimination did not simultaneously allege outrageous conduct because it alleged no "aggravated conduct," such as shouting racial slurs. 151 Cal. Rptr. at 831. Rather, a court must look behind the allegations of the pleadings to the facts themselves and determine whether the facts demonstrate conduct beyond that tolerated by society.

Even if defendants' actions rise to the level of outrageousness necessary to bring an intentional infliction of emotional distress claim, plaintiff's testimony fails to evince severe emotional distress. Nidds testified that he was humiliated by his layoff. *See* Andrews Decl. Ex. A at 328:10-12. He also testified that looking for a new job, filling out applications, going for job interviews and telling his family that he had been laid off were humiliating experiences. These types of allegations, however, cannot support an infliction of emotional distress

claim. As a matter of law, allegations of "great embarrassment, humiliation and shame" have been deemed insufficient. *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1047-48, 243 Cal. Rptr. 306, 311-12 (1988). Needless to say, a lay off can be a highly distressing event, but the tort laws do not insulate us from the vicissitudes that attend ordinary, if unfortunate, events of life. For the foregoing reasons, the court GRANTS defendants' motion for summary judgment on count three for intentional infliction of emotional distress.

2.

Plaintiff's claim for negligent infliction of emotional distress is preempted by the California Worker's Compensation Act ("CWA"). The CWA provides the exclusive remedy for injuries arising out of and during the course of one's employment. Labor Code at at 3600 *et seq.*; *Livitsanos v. Superior Court*, 2 Cal. 4th 744, 754, 7 Cal. Rptr. 2d 808, 815, 828 P.2d 1195 (1991); *Cole v. Fair Oaks Fire Protection Dist*, 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743 (1987) (claims for emotional distress arising from an employment relationship are barred by the exclusivity provisions of the Workers' Compensation Act).

Even if the CWA does not preempt plaintiff's claim, recovery for negligent infliction of emotional distress is granted in very limited circumstances. Where, as here, a negligence plaintiff is not the victim of physical impact or within the zone of danger, emotional distress damages are permitted only if plaintiff (1) is a witness to a physical injury inflicted on a third person, (2) is closely related to the injury victim, (3) is present at the time the injury occurs and (4) suffers serious emotional distress. *Thing v. La Chusa*, 48 Cal. 3d 644, 667-68, 257 Cal. Rptr. 865, 880-81, 771 P.2d 814 (1989). Plaintiff has failed to

present any evidence to support such a claim. Therefore, the court GRANTS defendants' motion for summary judgment on count four for negligent infliction of emotional distress.

C.

Defendants also urge the court to grant summary judgment on plaintiff's fifth count for breach of duty of good faith and fair dealing. In this count, plaintiff alleges that Schindler failed to pay his salary, pension benefits and other compensation due during the period after his first unlawful termination in October 1990 until his rehiring on January 29, 1991.

Schindler submits that this claim must be treated as a claim arising under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. at 185(a), because section 301 provides the exclusive framework for breach of contract claims where, as here, an interpretation of a collective bargaining agreement is required. *Fristoe v. Reynolds Metals Co*, 615 F.2d 1209, 1212 (9th Cir. 1980). When evaluated under section 301 requirements, Schindler contends that the claim should be dismissed either because (1) before bringing it, Nidds failed to exhaust remedies provided to him by his collective bargaining agreement, or (2) because the claim is time barred.

1.

An employee attempting to recover damages for breach of a collective bargaining agreement between his union and his employer must exhaust any arbitration or grievance procedures contained in that agreement before he may bring a suit against his employer under section 301. *Clayton v. United Automobile Workers*, 451 U.S. 679, 68 L. Ed. 2d 538, 101 S. Ct. 2088

(1981). The collective bargaining agreement under which Nidds worked contained grievance and arbitration provisions. While Nidds filed a grievance challenging his 1990 layoff, he never filed a timely grievance claiming that he was not provided all the compensation and pension benefits owed him under the terms of his agreement.

2.

Even if Nidds exhausted remedies provided by the agreement, the claim must still be dismissed because it is time barred. Section 301 contains no statute of limitations; however, federal courts have borrowed the six month statute of limitations found in section 10(b) of the National Labor Relations Act. *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983). Under *Del Costello*, Nidds was required to file his section 301 claim within six months of the date on which that cause of action accrued. A cause of action under section 301 accrues when the employee learns that his union has decided not to pursue his grievance. *Galindo v. Stoody Co*, 793 F.2d 1502 (9th Cir. 1986).

Nidds was advised that his union would not pursue his grievance arising from his 1990 layoff on October 25, 1990, but did not file suit until May 18, 1992, more than a year and a half later. Accordingly, plaintiff's fifth cause of action fails because of plaintiff's failure to exhaust remedies provided by the collective bargaining agreement and because it is time barred. Therefore, the court GRANTS defendants' motion for summary judgment on that count.

D.

Plaintiff also alleges causes of action for retaliation. In count

six, Nidds contends that he was removed from his Oakland service route in retaliation for filing his age discrimination claim against Schindler with the Department of Fair Employment and Housing.

Like disparate treatment claims, retaliation claims require a showing of intent. To establish a prima facie case of intent to retaliate, plaintiff must prove that: (1) he was engaged in statutorily protected activity; (2) an adverse employment action was taken against him; and (3) a causal connection or nexus existed between the activity and the adverse action. *Cohen v. Fred Meyer, Inc*, 686 F.2d 793, 796 (9th Cir. 1978).

In the present case, Nidds cannot prove that his transfer from the Oakland service route to the restoration/modernization department constitutes an adverse employment action. In *Ferguson v. E I du Pont de Nemours & Co*, 560 F. Supp. 1172 (D. Del. 1983), the court held that a transferred employee whose pay and benefits were not reduced had not be subjected to an adverse employment decision. Nidds testified that he did not experience a change in his rate of pay or his benefits as a result of his transfer to the modernization department. *See* Andrews Decl. Ex. A. Plaintiff's claim of retaliation is based only on his own opinion about the work to which he was assigned:

> Q. All right. Now, what was it about being assigned to the restoration department that you felt was retaliatory?
>
> A. The fact that I was put into doing work below my capacity.

*Id.* at 501:8-12.

Even if plaintiff establishes a prima facie case of retaliation, defendant need only produce admissible evidence which articulates a nonretaliatory explanation for the action. *Miller v. Fairchild Indus, Inc*, 797 F.2d 727, 731 (9th Cir. 1986). Here, Schindler has presented sufficient evidence illustrating that Nidds' removal from the Oakland service route to the restoration/ modernization department was necessary because Nidds' needed too much help from his co-workers trouble shooting malfunctioning elevators and because a number customers complained of Nidds' performance. *See* Willerton Decl. P. 10; Brown Decl. PP. 6-13. For the foregoing reasons, defendants' motion for summary judgment on count six is GRANTED.

E.

Finally, in count seven, plaintiff alleges that his layoff in July 1992 was in retaliation for filing a charge of discrimination with the Department of Fair Employment and Housing on December 16, 1990. The court finds that Schindler has articulated legitimate, nondiscriminatory reasons for plaintiff's July 1992 layoff. As noted above, shortly after plaintiff began working his new South San Francisco route, the Geneva Towers management, whose work made up a significant part of Nidds' route, requested that Nidds be removed from the route. *See* Andrews Decl. Ex. D; Scharfe Decl. P. 9 & Ex. B. Because Schindler had no other route to which Nidds could be assigned, Schindler laid off Nidds.

In opposing Schindler's motion for summary judgment, Nidds has essentially asked the court to second guess Schindler's business judgment. The court in *Gonzales v. Metpath, Inc*, 214 Cal. App. 3d 422, 262 Cal. Rptr. 654 (1989), stated

*Appendix C*

> The employment discrimination laws were never intended to turn the private-sector work force into a new form civil service, nor to commission our courts to sit as personnel review boards to oversee business judgments made by private enterprises. Employers must be given wide latitude to make independent, good faith personnel decisions without the threat of a jury second guessing their business judgment.

262 Cal. Rptr. at 658. Here, plaintiff has presented no evidence creating a triable issue of fact. Accordingly, the court hereby GRANTS defendants' motion for summary judgment on count seven.

The court, having granted summary judgment for defendant on all claims, directs the clerk to enter judgment for defendant and close the file.

The court is alarmed by plaintiff attorney's repeated reliance on depublished opinions, which should not have been cited to the court under California Rule of Professional Responsibility 5-200 and Local Rule 110-3. This conduct may warrant disciplinary action by the State Bar. Accordingly, the clerk shall send by certified mail a copy of this order and copies of the pleadings filed by Daniel Ray Bacon in connection with this motion to the Intake Division, State Bar of California, 1149 South Hill Street, Los Angeles, CA 90015-2299 for investigation.

IT IS SO ORDERED.

VAUGHN R. WALKER